

INDEX

	PAGE
Petition	1
Answer	4
Order Dismissing Petition.....	6
Notice of Appeal.....	8
Petition of Appeal.....	9
Answer to Petition of Appeal.....	11

TESTIMONY.

For Petitioner.

Gustave L. Goldstein,	
direct examination.....	12
cross “	45
re-direct “	85
I. Edward Gluckman,	
direct examination.....	86
cross “	92
Deposition of Dr. Lawrason Brown ...	130
Deposition of Dr. Henry Leetch	140

For Defendant.

George G. Ornstein,	
direct examination.....	96
cross “	108
re-direct “	119
re-cross “	121
Marcus H. Greifinger,	
direct examination.....	161
cross “	166
re-direct “	184
Regina Goldstein,	
direct examination.....	185
cross “	195
re-direct “	212
re-cross “	212

	PAGE
<i>Rebuttal.</i>	
Gustave L. Goldstein,	
direct examination.....	218
cross "	222
Argument for Defendant	225
Argument for Petitioner	226
Conclusions of Vice-Chancellor.....	235
	Off'd P't'd
Exhibit P. 1. Depositions	129 240-285
Dr. Lawrason Brown,	
direct examination.....	240
cross "	249
re-direct "	252
re-cross "	253
Dr. Henry Leetch,	
direct examination.....	256
cross "	272
re-direct "	275
Rudolph J. Plank,	
direct examination.....	277
Stipulation	284
	Off'd P't'd
Exhibit P. 2. Interrogatories and	
Answers	160 286

PETITION.

Filed March 21, 1929.

In Chancery of New Jersey

To his Honor, EDWIN ROBERT WALKER, Chan-
cellor of the State of New Jersey:

10

The petition of GUSTAVE L. GOLDSTEIN, of the
City of Newark, in the County of Essex and
State of New Jersey, respectfully shows:

1. On the 24th day of June, 1928, a cere-
mony of marriage took place between your pe-
titioner, Gustave L. Goldstein, and Regina
Greifinger, the defendant in this suit, in the City
of Newark, State of New Jersey, the said cere-
mony having been performed by Julius Silber-
feld, a Rabbi authorized to perform marriages.

20

2. The defendant was, at the time of the said
marriage, and for more than two years last
past, has been a bona fide resident of the State
of New Jersey, and the said defendant, at the
present time, is a bona fide resident of the State
of New Jersey.

3. Petitioner was, at the time of his said
marriage, and has always been and now is a bona
fide resident of the State of New Jersey, re-
siding at Newark, in the State of New Jersey.

30

4. Previous to June 24, 1928, the defendant
was, to her knowledge, suffering from chronic
tuberculosis, and had been afflicted with such
tuberculosis for some time prior thereto. At the
time of the marriage aforesaid, petitioner had
no knowledge that the defendant was so afflicted
and the defendant did not inform petitioner of

40

Petition.

such condition or of that fact, but concealed it from him, and petitioner charges that the said defendant fraudulently concealed the fact that she was afflicted with tuberculosis from petitioner knowing that if she disclosed said fact, petitioner would not have married her.

10 5. Petitioner had no knowledge of the facts aforesaid until on or about February 24, 1929, and since the discovery of said fact, petitioner has not lived with his said wife. The said defendant is now under medical attendance for treatment for said disease at Saranac Lake, in the State of New York. Tuberculosis is an infectious, contagious disease transmissible to the offspring.

20 6. There are no issue as a result of the marriage of defendant and said petitioner.

Petitioner prays that said pretended marriage between your petitioner and said defendant may be declared by the decree of this Honorable Court to be null and void for the cause aforesaid, and that your petitioner may have such further relief as shall be just.

GUSTAVE L. GOLDSTEIN,
Petitioner.

30 MILTON M. UNGER,
Solicitor for Petitioner.

40

Petition.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

GUSTAVE L. GOLDSTEIN, of full age, being duly sworn according to law, on his oath deposes and says:

I am the petitioner named in the foregoing petition; my said petition is not made by any collusion between me and the defendant, but in truth and good faith for the causes set forth in the petition. 10

GUSTAVE L. GOLDSTEIN.

Sworn and subscribed to before
 me this 20th day of March, 1929.

LILLIAN C. HODES, . 20
 A Notary Public of New Jersey.

30

40

ANSWER.

Filed June 12, 1929.

IN CHANCERY OF NEW JERSEY.

10

73/18

*Between*GUSTAVE L. GOLDSTEIN,
*Petitioner,**and*REGINA GREIFINGER, otherwise
known as Regina Goldstein,
*Defendant.**Answer.*

20

The defendant, Regina Greifinger, otherwise Regina Goldstein, answering the petition says:

1. She admits the statements contained in paragraph 1.

2. She admits the statements contained in paragraph 2.

3. She admits the statements contained in paragraph 3.

30 4. Answering paragraph 4 she says that, prior to June 24, 1928 she had been afflicted with tuberculosis; she says that she was attacked in 1923, but after a period of several months was advised that she had been cured; that she suffered from a cold in February of 1928, and was attended by physicians; that petitioner had full and complete knowledge of the situation before the marriage and defendant concealed nothing from him; otherwise than as herein admitted de-

40

Answer.

fendant denies the statements contained in paragraph 4.

5. She denies the statements contained in paragraph 5 except that she admits that she is under medical attendance for treatment for tuberculosis at Saranac Lake, New York.

10

6. She admits the statements contained in paragraph 6.

MERRITT LANE,
Solicitor for Defendant.

20

30

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ORDER DISMISSING PETITION.

Filed November 26, 1929.

IN CHANCERY OF NEW JERSEY.

10

73-16.

Between

GUSTAVE L. GOLDSTEIN,
Petitioner,

and

REGINA GREIFINGER, otherwise
Regina Goldstein,
Defendant.

On
Petition, &c.

Order Dis-
missing
Petition.

20

30 The above-entitled cause coming on to be heard in the presence of Milton M. Unger, of counsel with petitioner, and Merritt Lane, of counsel with defendant, and the evidence offered by the respective parties having been taken, and the arguments of counsel having been heard, and the Court having considered the pleadings, proofs and argument of counsel, and being of the opinion that petitioner was not induced, by the fraud of defendant, to enter into the marriage and that petitioner knew the facts with respect to defendant's condition of health prior to and at the time of the marriage; that petitioner is not entitled to the relief prayed for in his petition:

40 It is, on this 26th day of November, 1929, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed and the said Chancellor doth, by virtue of the power and authority of this court, hereby order, adjudge and decree that the petition of

Order Dismissing Petition.

the petitioner be and the same is hereby dismissed upon the merits.

And it is further ordered that the petitioner pay to the defendant the sum of \$700 for counsel fees, the sum of \$30.00 for expenses in and about the taking of testimony at Saranac Lake, New York; the sum of \$145.50 for stenographer's fees for a copy of the testimony taken before this court furnished to the defendant, and the sum of \$25.80 for the copy of the testimony taken at Saranac Lake furnished to the defendant, together also with the taxed costs of this cause, and that execution issue therefor in accordance with the practice of this court.

E. R. WALKER.

Respectfully advised,

ALONZO CHURCH,
V.-C.

O. K. as to form.

MILTON M. UNGER,
Solicitor for Petitioner.

MILTON M. UNGER,
Solicitor for and of Counsel
with Petitioner.

MILTON M. UNGER,
Of Counsel with Petitioner.
Gustave A. Goldstein.

NOTICE OF APPEAL.

Filed, Dec. 12, 1929.

IN CHANCERY OF NEW JERSEY.

73-16.

10

7800

*Between*GUSTAVE L. GOLDSTEIN,
*Petitioner,**and*REGINA GREIFINGER, otherwise
Regina Goldstein,
*Defendant.**On Petition,
&c.**Notice of
Appeal.*

20

The petitioner, Gustave L. Goldstein, hereby appeals from the decree made in the above-entitled cause by the Chancellor on the advice of Vice-Chancellor Alonzo Church, on November 26, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30 Dated December 2, 1929.

MILTON M. UNGER,
Solicitor for and of Counsel
with Petitioner.

I conceive there is good cause for appeal in the above-entitled cause.

MILTON M. UNGER,
Of Counsel with Petitioner,
Gustave L. Goldstein.

40

PETITION OF APPEAL.

Filed, Dec. 12, 1929.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.***Between*

GUSTAVE L. GOLDSTEIN,
Petitioner-Appellant,
and

REGINA GREIFINGER, otherwise
Regina Goldstein,
Defendant-Respondent.

*On Appeal
from Decree
in Chancery.*

*Petition
of Appeal.*

10

To the Honorable Court of Errors and Appeals 20
in the last resort in all causes:

The petition of Gustave L. Goldstein, the appellant in the above-entitled cause, respectfully shows that:

1. Your petitioner finds himself aggrieved by a certain final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Alonzo Church, Vice-Chancellor, dated November 26, 1929, in a certain cause in the said Court of Chancery, wherein your petitioner was the petitioner, and Regina Greifinger, otherwise Regina Goldstein, was the defendant. 30

2. The said decree provides for the dismissal of your petitioner's petition in the Court of Chancery. Your petitioner appeals from the whole of the said decree and from each part thereof upon the grounds that the same is erroneous in the following respects: 40

Petition of Appeal.

a. The Court below erred in decreeing that the petitioner's petition be dismissed.

10 b. The Court below erred in failing and refusing to find that your petitioner was entitled to a decree annulling the supposed marriage between himself and the respondent.

c. The Court below erred in refusing and failing to find that the respondent was chargeable with such fraud as to entitle your petitioner to the annulment of the supposed marriage between your petitioner and the respondent induced thereby.

20 d. The Court below erred in dismissing the petition of your petitioner upon the ground that petitioner did not corroborate the essential elements of his cause of action.

e. The Court below erred in failing and refusing to grant to your petitioner the relief prayed for in his petition.

MILTON M. UNGER,
Solicitor for and of Counsel
with Petitioner-Appellant.

30

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ANSWER TO PETITION OF APPEAL.

Filed Dec. 13 ,1929.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

*Between*GUSTAVE L. GOLDSTEIN,
Petitioner-Appellant,
*and*REGINA GREIFINGER, otherwise
known as Regina Goldstein,
Defendant-Respondent.

*Answer to
Petition
of Appeal.*

10

Answer of defendant-respondent to the petition
of appeal of the above-named petitioner-appel-
lant.

20

This respondent, not acknowledging all or any
of the matters which in the said petition of
appeal are contained to be true, for answer
thereto, nevertheless, says and admits that a
decree was on the 26th day of November, 1929,
made and entered in the Court of Chancery, in
the cause for that purpose mentioned in the said
petition, as is therein stated; but as to the sub-
stance and form thereof this respondent prays
to refer thereto when the same shall be produced,
and this respondent is advised and believes that
the said decree is agreeable to equity and she
prays that the same may be affirmed, the costs
to be adjudged to this respondent.

30

MERRITT LANE,
Solicitor for and of Counsel
with Defendant-Respondent.

40

Gustave L. Goldstein, for Petitioner, direct.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

October 10, 1929.

10

Between

GUSTAVE L. GOLDSTEIN,
Petitioner,

and

REGINA GREIFINGER, otherwise
Regina Goldstein,
Defendant.

20

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Milton M. Unger for petitioner; Merritt Lane for defendant.

GUSTAVE L. GOLDSTEIN, sworn for petitioner.

30

Direct examination by Mr. Unger.

Q Mr. Goldstein, you are the petitioner in this suit? A I am.

Q And you are married to the defendant, Regina Goldstein? A Yes, sir.

Q What was her maiden name? A Regina Greifinger.

Q And when were you married to her? A
40 June 24, 1928.

Gustave L. Goldstein, for Petitioner, direct.

Q Prior to that time, when had you first met her? A I met her for the first time during the summer of 1927, just a casual introduction.

Q And where did that meeting take place? A At the Berkeley-Carteret, Asbury Park.

Q And did she appear to be in good health at that time? A Yes, sir. 10

Q Now, when next did you see her? A I met her the next time around the middle of October—around October or the middle of October, 1927.

Q And where was that? A At her home; and we went out that evening.

Q Have you seen her between the summer of 1927 and October of 1927? A No, sir.

Q Now, after October, 1927, did you continue to see her after that? A I saw her very often after that. 20

Q About how often? A Several times a week.

Q And what was her health, so far as it appeared to you during that time? A She seemed to be in the best of health.

Q Did you go out with her, take her out? A Oh, yes, surely, went all over with her, football games, and so forth.

Q And did you call on her at her home? A Often. 30

Q Where did she live at that time? A 225 Pomona avenue, Newark.

Q And when did you become engaged to her? A I proposed to her on December 22, 1927, and became engaged to her on February 4, 1928.

Q Were you accepted on December 22, 1927, when you first proposed to her? A Yes, sir.

Q And between October of 1927, and December 22, 1927, you had had a chance to observe her from time to time? A Yes, sir. 40

Gustave L. Goldstein, for Petitioner, direct.

Q Had her health, so far as you were able to observe, continued to be good? A Yes, sir.

Q Was she ill during that time at all? A No, sir.

Q No. Now, between December, 1927, and I think you said, February— A February, 1928.

10 Q Yes. —did you continue to meet her? A Yes, sir.

Q And during that period of time was she ill? A Around the last week of January, 1928, or thereabouts, she was taken ill.

Q And where was she at that time? A At her home.

Q In Newark? A In Newark; yes, sir.

20 Q And did she inform you the nature of her illness? A She told me that she had a cold.

Q And was she in bed? A Yes, sir.

Q Did you see her while she was in bed? A Yes, sir.

Q Do you know during what month it was she was in bed? A I would say the latter part of January, that is, starting the last week in January, and practically throughout the month of February with the exception of perhaps the last week in that month.

30 Q And was there any physician in attendance upon her? A So far as I know, her brother attended her.

Q What was his name? A Dr. Marcus Greifinger.

Q And did you see him in the home? A I saw him occasionally, yes.

Q Did you have any talk with him as to what was the matter with her? A Yes, sir.

40 Q What did he tell you? A He told me she had a cold.

Gustave L. Goldstein, for Petitioner, direct.

Q Was there anything in her condition which indicated to you that she had anything other than a cold? A No, sir; nothing at all.

Q Now, how long did she remain in bed? A Altogether she was in bed about a month, during the period of time that I have stated.

Q And you called there during that time? A 10
Yes, sir.

Q And about when, would you say, that she got out of bed? A I would say, around the latter part of February.

Q And did you, in the meantime, present her with an engagement ring? A Yes, sir; on February 4, 1928, I gave her the engagement ring. She was in bed at that time.

Q Yes. Now, did you at that time fix any date for the marriage? A No. The date was 20
fixed subsequently.

Q Now, during the time that she was in bed, February, 1928, was there any other physician in attendance besides Dr. Greifinger? A A Dr. Ornstein, of New York City, visited her on one occasion.

Q And do you know when that was? A As far as I can fix the date, I think it was the evening of February 7, 1928.

Q Were you there? A I was there for a 30
few minutes.

Q What time did you come? A I arrived at the house about ten-thirty P. M. I had just returned from a meeting held in New York City. While attending that meeting I called up the home to find out how Regina was feeling. Her father told me she was in very bad shape. I called up several times and they told me there was another doctor in consultation with them. I got back to Newark a little after ten, hopped in a cab and came up to the house. When I came 40

Gustave L. Goldstein, for Petitioner, direct.

up to the house I was there only a few minutes when Dr. Ornstein came into the living room, as he descended the stairs from upstairs, and came into the living room, and I met him there for a few minutes.

10 Q What did he say to you? A Her father introduced me to him. I asked him how Reggy was feeling. He told me she had a cold, she would be all over it, it might be perhaps an attack of pneumonia, but there was a very bad cold in any circumstance, and she would be well in a very short time, perhaps a week or so. He seemed to be in a very great hurry to get back. In fact, he stated at the time, he said, "I am in such a hurry to get back; it looks as though I won't be back before midnight now."

20 Q And was that the extent of the conversation between you and Dr. Ornstein that night? A That and—except the comment he made that I had a very nice girl.

Q Was Dr. Greifinger there on that occasion? A I don't recollect whether he was in the room at that time.

Q Who else was there outside of the doctor and yourself? A I know that her father was in the room.

30 Q Did her father, or any member of her family, volunteer any other information— A No, sir.

Q —regarding her condition at that time? A No, sir.

40 Q Now, during the time that you were engaged and prior to your marriage, did any member of her family inform you in any other way than you have already testified to, regarding her condition, or tell you anything else that might be the matter with her? A No, sir.

Gustave L. Goldstein, for Petitioner, direct.

Q No. Now, you were married when? A
On June 24, 1928.

Q Before that time did you have occasion to take out any life insurance for yourself? A About a few weeks before I was married I took out a policy for eight thousand in the Union Central Life Insurance Company, naming Miss Greifinger, that is, the then Miss Greifinger as the beneficiary. 10

Q Did you inform her of that? A I told her about it at the time. I just received a policy from my insurance broker, and I told her, "Well, Reggy, here is a clean bill of health," and taking a phrase that appears sometimes in the newspapers about being fit to marry, I says, "and your boy friend is fit to marry you."

Q Did she make any answer to that? A She said, "Well, so is your girl friend." 20

Mr. Lane: I didn't get that.

The Witness: "So is your girl friend."
When I was up to see Dr. Echekson to have my ears cleaned recently—

Q You are telling what she said to you? A I was up to see Dr. Echekson to have my ears cleaned recently and he told me I am fit to marry. 30

Q That was before you had married her? A Exactly.

Q And you fixed the time—can you fix the time? A I can fix the time by the date of the policy, the policy with the Union Central.

Q What month was that? A It was the month of June, perhaps a week or two weeks before I married her.

Q When did she get out of bed? A You mean from the— 40

Gustave L. Goldstein, for Petitioner, direct.

Q From the illness you have testified about?
A You mean the February illness?

Q Yes. A The latter part of February, 1928.

10 Q Now, from that time down to the time when you married her, which I understand was June 24, 1928, had she been ill? A No, sir.

Q And what was the condition of her health, so far as you were able to observe? A Excellent.

Q Did you go out with her? A Very often.

Q Where did you take her to during that period of time? A Oh, we went to shows and in New York City, went out to different affairs, occasions and so forth. I guess we were out any number of times during that time.

20 Q Now, where were you married? A At her home.

Q In Newark? A In Newark.

Q And after you were married did you go away on a honeymoon? A Yes, sir; we went away for about a period of a month.

30 Q And where were you during that time? A We went through the upper part of New York State, through the Adirondacks, Montréal, Quebec, with a trip up the Saganay River to Thousand Islands, Niagara Falls, through the Great Lakes, Toronto, Cleveland, Detroit—not Cleveland—Detroit, Chicago, and spent about a week or ten days at Mackanac Island, Michigan.

Q Now, you returned to Newark when? A Returned to Newark around the last week in July, I would say, about July 24th or 25th, around that time.

40 Q You were gone about a month? A About exactly a month.

Gustave L. Goldstein, for Petitioner, direct.

Q Now, during that period of time you were with her, I presume, constantly? A Yes, sir; all the time.

Q And what was her health during that period? A Seemed to be excellent.

Q Did she indicate that she was suffering from any disease or ailment of any kind? A 10
No, sir.

Q Did anything at all appear to be the matter with her, so far as you were able to see? A
Nothing at all.

Q Now, when you came back, was she in good spirits? A She seemed to be in the very best of spirits, as a matter of fact, she even commented and said it was the most delightful time she ever had in her life.

Q Now, you came back to Newark the end of July; is that right? A Right. 20

Q Where did you go to live? A Went to her folks until we would get an apartment.

Q Did you and she make any arrangement about that? A Well, we were to stay with the folks until we got an apartment, and around August 1st I took a lease for an apartment.

Q Yes. And during the summer did you go away with her anywhere? A We went down to the shore several times and around the city. 30
Went out often.

Q Now, did you make any arrangement to take an apartment at any particular time? A Well, we took the apartment on August 1st.

Q You rented one? A Rented one. Actually signed the lease on August 1st. That was about the week after we had returned from our honeymoon.

Q Did you move into it? A No, sir.

Q Why not? A Well, she did not seem to be anxious to start housekeeping. Well, she 40

Gustave L. Goldstein, for Petitioner, direct.

said there was no hurry to start housekeeping. We might wait a little while. At least let the summer pass by; we had gotten a very nice concession on that rental and she said we might just as well go in towards Labor Day or a little after Labor Day.

10 Q And you were willing? A I was agreeable.

Q Yes. Now, did her good health continue?

A Yes, sir.

Q Until about when? A Until about the middle of September.

Q And will you tell us what happened then?

A Why, we were engaged in getting together different things for our apartment, buying furniture and other articles that we would need for
20 the apartment and fixing it up. Around the middle of September she seemed to have caught cold. Her brother ordered her to bed and she was in bed for a period of several weeks. I asked her brother what the trouble was and he told me that it was a cold, perhaps a slight attack of bronchitis. That illness continued up until the time, around the middle of October when she went to Lakewood.

30 Q Who suggested that? A It was at my suggestion that she went to Lakewood.

Q And did she remain in Lakewood? A She remained in Lakewood for about one week.

Q Did you go down there? A I took her down to Lakewood. About a week later she came back.

Q And when she came back was she well? A She said she was.

40 Q Well, what did you notice? A Well, she seemed to me to be and then when I met her at the station, the Central Railroad, when she

Gustave L. Goldstein, for Petitioner, direct.

came in, she embraced me and told me, "Well, dear, I am all well and we are ready to go now."

Q What happened after that? A She was on her feet, that is, got around the city for about a week or two. In fact, we went out during that time, and then she was taken ill again and she went to bed again. Again I was told that she had a cold. 10

Q Who told you that? A Her brother, told me that it was, that same bronchial condition, it was simply a continuation of the former condition.

Q Now, at about that time was any other physician attending her outside of her brother? A Why, before she went to Lakewood, she told me that she had been examined by Dr. Ornstein. 20

Q Yes. A And that Dr. Ornstein had simply told her the same thing, that she had a bronchial condition and she should be well in a very short time.

Q Did she tell you where she had been examined by him? A At his office.

Q In New York? A In New York.

Q Had you known that she had gone there to be examined? A On this particular occasion I think she told me that she intended to see Dr. Ornstein. 30

Q Yes. Did you go with her? A No, sir.

Q And you knew that she had gone because she told you that? A Exactly.

Q And after she returned, what is it you say she told you? A Why, she told me that she and her brother—that her brother had taken her over—told me that she had a bronchial condition. 40

Gustave L. Goldstein, for Petitioner, direct.

Q Did you make any inquiries of her at that time as to why she was going to see Dr. Ornstein? A I did comment on it, it struck me rather odd that with a case of simple bronchitis that she would have to go to a doctor in New York. The explanation was that Dr. Ornstein
10 was a very good friend of the family, was a very good doctor, and, as long as his services were available free, why, she might just as well take advantage of it.

Q Now, after she returned from Lakewood, just what was her condition during the ensuing months? A Why, she seemed to be having a constant run of fever, had a slight cough, and, I guess, the general symptoms of a cold. At least, that is the way it struck me.

Q You were living with her with her folks at that time? A Yes. We continued to remain with the folks because they seemed to feel that she would have better care at her home than she might have at my apartment.
20

Q You did not take the apartment? A We had the apartment, yes.

Q I mean, you didn't move into it? A Didn't move into it.

Q And you were living with her in her parents' home occupying the same room? A Yes, sir.
30

Q And were you living together at that time as man and wife? A Yes, sir.

Q Now, won't you tell us the course of her illness at that time? A As I said before, she had this bronchial condition, that continued up until about Thanksgiving Day, around Thanksgiving Day. Thanksgiving Day my fraternity, my high school fraternity run off the annual dance and affair, and she seemed to feel that I
40 was very anxious to go, although I tried to make

Gustave L. Goldstein, for Petitioner, direct.

clear that in view of her condition, I did not think she ought to go to a dance, and she seemed to be so insistent that I said, "Well, I will go. Ask your brother, and if he says you can go, why, we will go to the dance." I called her brother into the room and asked whether it was O. K. to go to the dance and he said, "Of course, there is nothing the matter with her, she can go to the dance." 10

Q Was she there at the time? A She was there at the time. She went downtown that afternoon, I think she went to a beauty parlor and had her hair washed and she went to that affair. It was a formal affair; she was attired in an evening gown; and I took it for granted from what her brother told me and she told me, that she was well enough to go to the dance. The next morning she was very ill. She developed, apparently, a very violent cough, caught a severe cold. I bawled her out for going to the dance and she told me she should not have gone to that dance, she had been so very sick the day before. She had a menstrual period at that time, and, whereas she was accustomed to run a fever around 99 or 99 and $\frac{1}{2}$, that particular day she had run a fever of 100, and on this day, the Thanksgiving Day, the day after the dance, her fever even ran higher. From that time on her illness continued worse. 20 30

Q Now, before you went to the fraternity affair on Thanksgiving Eve, had any of your folks called upon her with reference to her illness? A Yes. My mother and sister had called upon her at intervals of about once a week, sometimes oftener, sometimes—(interrupted).

Q Yes. Was there any particular occasion that you recall upon which your mother and sister came and made an inquiry of her as to her 40

Gustave L. Goldstein, for Petitioner, direct.

health? A Why, on each occasion that they came there they inquired of her health.

Mr. Lane: Was he there?

Q I mean, in your presence? A Oh, yes, in
10 my presence, surely.

Q Yes. A Inquired of her health, and on
several occasions her brother was there, and on
each occasion my folks were told that she had
a cold and bronchitis, and, on one of these oc-
casions, my mother made a suggestion that per-
haps she might try some of these home remedies
that folks will use in matters of that kind, and
suggested that to Dr. Greifinger, that maybe
she might take some olive oil or put some lard
20 on her chest, or some home remedies, and she
asked Dr. Greifinger if there was any harm in
it and Dr. Greifinger said, "Well, it can't do any
harm, it may do some good. Try it." And,
pursuant to that suggestion, she did start taking
olive oil.

Q After the fraternity affair, when you say
she grew worse, to what extent did her illness
go? A Well, she developed a very severe
cough. Her cough was very violent. Particu-
larly was that true in the morning. Very often
30 she waked me up in the morning with a cough-
ing spell that was so violent in its nature that
I almost thought she was convulsed. She seemed
to be bringing up a lot of sputum and she seemed
to have a persistent run of fever. That condi-
tion continued right up to the time she went
away.

Q Had you observed any of that coughing or
bringing up sputum before the fraternity affair
in November? A No, sir; except she had that
40 slight cough, but otherwise I did not.

Gustave L. Goldstein, for Petitioner, direct.

Q Did she in any way exhibit signs of illness? A Those were the only things that I really observed.

Q Now, did she eat well? A She had difficulty in holding her food. Very often, after she would eat, she would get a spell of vomiting, throw up all the food.

10

Q Now, up to that time had she informed you of anything concerning her illness or the source of it other than what you have already told us about? A Not a word.

Q Now, did you have a talk with her about that time as to what the matter was with her on any occasion? A About a week or so after Thanksgiving, it was her custom—it had been her custom to retire to bed about nine o'clock; after she would retire to bed, I would go downstairs and read for an hour or two and then come up and retire myself; I came up to the room and I had undressed and was going to bed when I heard someone sobbing. The sobbing was quite audible. I asked Reggy whether she was crying and she just moaned. I went into bed with her and asked her what she was crying about. She told me—"Gee," she said, "I am so terribly sick," she said, "I should have never dragged you into this." She said, "I should have told you before I married you that I was sick." I said, "Well, I know you were sick, I know you had that cold in February," I said, "that is nothing bad, there is nothing terrible about that," that was all she said.

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30

Q She mentioned to you that she had been suffering from tuberculosis? A Not the word.

Q Did she mention that word, or consumption or anything like that? A Never.

Q And did you at that time suspect that she had it? A Not at that time.

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Gustave L. Goldstein, for Petitioner, direct.

Q Now, how did she continue after that? A Why, she continued with the same symptoms.

Q Well, did that continue down through the end of the year? A Right through the end of the year and the early part of the following year.

10 Q And she was in bed or out of bed? A In bed all the time.

Q You had not gone to housekeeping? A No, sir.

Q You told us about an occasion of hawking up the sputum. Did that condition continue? A Yes, that condition continued, and continued right along.

20 Q Did you continue sexual relations with her? A Why, around the first week of December, it rather struck me, as a layman, that perhaps it was inadvisable to have intercourse, she seemed to be so terribly sick. Prior to Thanksgiving Day it appeared to me as if she was only moderately ill; now she seemed to be so very ill; I suggested to her perhaps it would be best for us to stop having intercourse, perhaps it was harmful to her, and she acquiesced in that suggestion, and from that time on we never had intercourse.

30 Q That was in December, 1298? A Around the first week in December, 1928.

Q Now, during that time did she make any reference to where or when her illness had started? A Why, she said, well, she said, "I should never have gone to that dance. This cold has got me right." And she seemed to feel that her illness, that is, she expressed herself that her illness from that time on was due to the cold that she caught at the dance.

40 Q Now, did you have a talk with her at any time in her mother's presence as to whether or

Gustave L. Goldstein, for Petitioner, direct.

not she had become ill while she was at college, Brown University? A Why, we were sitting in the room one night, her mother, Reggy and I—

Q Will you fix the time? A It was about the same time, right around this time, several things happened that stand out very clearly in my mind. I cannot fix the date or sequence of the date, but they happened almost all together. 10

Mr. Lane: I think he should fix the time.

Q Mr. Lane wants to know what time you are referring to. A Around the first week in December Reggy had made some wise little remark, or a clever, witty remark and I suggested to her mother, "Well, that is what they learn at college." 20

Q You said what? A I said, "That is what they learn at college, probably got that at Brown." And her mother said, "Yes, that is where this whole business started, at Brown."

Q That was in December, 1928? A That is right.

Q Now, did you do anything with reference to your wife's condition about this time? A Right, about this time, my brother coming from Asbury Park and he asked me what the trouble with Reggy was and I told him. 30

Mr. Lane: I object to that.

The Court: Yes.

Q Don't tell what he said; tell what you did, if you did something, as a result of what he told you. A Why, about this time I began to feel that perhaps there ought to be a change in the doctors that she was using, and I suggested to 40

Gustave L. Goldstein, for Petitioner, direct.

her perhaps we ought to get another doctor. The doctors that she was using perhaps might be good and satisfactory, but apparently they were not making any headway with her illness. I suggested to her that she use Dr. Fuerstman. She said she would not permit herself to be examined by Dr. Fuerstman, nor did she want to use Dr. Fuerstman. Her brother, also, scouted the idea, saying that he was only a family physician. Dr. Ornstein was a very good man. He could very well handle the situation. I seemed to feel at that time that, after all, her brother was a doctor, she was probably as dear to him as she was to me and he undoubtedly had her own interests at heart, and, with that thought in mind, I permitted the same doctor to continue to treat her. After several weeks went by and she seemed to make no headway, I became very persistent in my demand that she have another doctor and I told them at this time I wanted to use Dr. Polevski. They both laughed at the idea.

Q Who do you mean by "both"? A My wife and Dr. Greifinger, they both laughed at the idea, the idea of using Dr. Polevski, but, as a result of my persistent demand, Dr. Polevski did call upon her and did examine her. As I recall, he examined her either on a Saturday or some day prior to a holiday, because my office was closed the following day. Dr. Polevski had called at the home to examine her. When I returned from my office that day, I asked Reggy what Dr. Polevski said and she told me, she says, "I must be terribly sick." And I asked her what made her think so and she said, "Well, when Marcus came in—" (interrupted).

Q Who is "Marcus"? A Meaning her brother, the doctor, "when Marcus came in he

Gustave L. Goldstein, for Petitioner, direct.

was white as a ghost," she said, "I must be very sick." So I said, "What did he say?" "Well, he seems to think I have got bronchitis or the same thing," she said, "practically the same thing that Dr. Ornstein said, but he says he will have to examine me, he wants to take an X-ray of me." The following day, which was either a holiday or a Sunday, I don't recall which, she went down with her brother to Dr. Polevski's office and when they returned I asked them what he stated. Her brother said, "Why that fellow is nothing but a shoemaker. Took red pencils and blue pencils and marked up her chest and her back in an attempt to diagnose her, but," he said, "he did reach the same result that Dr. Ornstein reached." I said, "What is that?" "Why, she has an attack of bronchitis." She continued to be ill after that and seemed to be making no progress and I told her brother that I was beginning to suspect there was something wrong. I told him that I wanted to engage my own doctor from now on, I wanted to get a doctor that would be responsible to me for the result; and I went down to see Dr. Fuerstman, who was an uncle of my brother's by matrimony and I told Dr. Fuerstman—

Mr Lane: I object to that.

The Court: Yes.

A (Continuing.) I obtained from Dr. Fuerstman the names of several doctors, and when I returned home I told her brother that I had spoken to Dr. Fuerstman and Dr. Fuerstman told me from what—(interrupted).

Mr. Lane: I object to that.

Gustave L. Goldstein, for Petitioner, direct.

The Court: No. Don't say what Dr. Fuerstman told you.

10 Mr. Unger: Your Honor please, I would think that was material and competent, because he has the right, I would say, to tell Dr. Greifinger what had been reported to him by another doctor, in view of ascertaining an answer.

Mr. Lane: Well, any statement of Dr. Greifinger does not bind us yet.

Mr. Unger: No, that is not Dr. Greifinger's statement.

Mr. Lane: Well, the statement made by this witness to Dr. Greifinger. How does any statements made to Dr. Greifinger bind us?

20 Mr. Unger: I understood this was in the presence of his wife?

Mr. Lane: Well, that was the suggestion, but it has not been testified to yet.

The Witness: No, this conversation with Dr. Greifinger was not in the presence of the wife.

30 Q All right. Do not tell what Dr. Fuerstman said, but you can say what you told him. A I told—

Mr. Lane: I object to that.

The Court: No.

Mr. Unger: This is a statement made to her physician and to his physician, the man who was treating her at that time, Greifinger.

Mr. Lane: Suppose that is true?

Mr. Unger: I think it is perfectly competent.

40 The Court: I do not think so.

Gustave L. Goldstein, for Petitioner, direct.

The Witness: I told Dr. Greifinger—(interrupted).

Mr. Lane: I object, if the Court please.

The Witness: I am not going to say—(interrupted).

Mr. Unger: The Court has ruled that out. 10

Mr. Lane: I object to what he told Dr. Greifinger.

Q Did you talk to your wife? A I spoke to my wife about this time. I told her I was going to have another doctor examine her and I would absolutely insist upon it whether she liked it or not, I was going to get another doctor and she wanted to know who I was going to get, and I told her I would not tell her who I intended to get, that I simply would bring a doctor to the house. 20

Q Did you have any reason for refusing to tell her what doctor you were going to get? A I felt that her brother and Dr. Ornstein were concealing either the nature or the extent of her illness and I told her that and I told her that I wanted to get another doctor because I wanted to have a doctor that would tell me what her trouble was.

Q Now, did you tell her at that time what Dr. Fuerstman had reported to you? A I did not tell her what Dr. Fuerstman had reported to me, because I did not want to cause her any unnecessary alarm. 30

Q All right. Now proceed. A I became very persistent in these demands, this is already towards the latter part of December or early part of January, and about this time, or, say, around the middle of January, it may have been about that time, my wife told me she was going 40

Gustave L. Goldstein, for Petitioner, direct.

to Dr. Ornstein to be examined again. She wanted me to go along with her. I told her I did not care to go to Dr. Ornstein, that I had no confidence in the man, I had no confidence in what her brother said. Finally she prevailed upon me to go with her. Her brother and she
10 and I went to Dr. Ornstein's office.

Q When was this? A I would say that was the latter part of January.

Q In 1929. A 1929. We all went to Dr. Ornstein's office. He gave her a physical examination, in my presence, and then took us all inside into the dark room. She was disrobed and stood before a fluoroscope and Dr. Ornstein attempted to explain to me what the fluoroscope showed. He said, "You see the trachea and the
20 lungs are pushed together." I told him, "Doctor, I don't know anything about these things. I don't know anything about anatomy." I said, "Frankly speaking, I don't even know what a trachea is." I says, after we got out of the dark room, I said, "I want to know what the trouble is? How do you designate her ailment? What is she suffering from?" And he says, "She has got a very bad cold and bronchitis."
30 And I said, "Well, doctor, I want to ask you a question. Has my wife got tuberculosis?" He says, "Absolutely not. Don't be foolish." I said, "Doctor, do you think my wife ought to go away for a little while?" I asked him that question because I wanted to see the response it would draw. "Well," he said, "it wouldn't do her any harm for her to go away for a little while." I said, "Do you think a trip up to Saranae Lake might do her any good?" "Well,"
40 he says, "it may do her some good."

Gustave L. Goldstein, for Petitioner, direct.

Q Prior to that time did anybody suggest to you that Saranac Lake was a good place for her?

A No, sir.

Q Why did you suggest Saranac Lake? A I suggested Saranac Lake because I already suspected from things I had heard and seen that she was not suffering from bronchitis and I wanted to see what response my suggestion would draw. He said to me, "It won't do her any harm to go up there. Suppose she does go up there for about a month or so." And after that we made arrangements for her to go to Saranac Lake. 10

Q Did you take her there? A I took her up.

Q When was that? A I took her up at night; we left New York City, I think, on February 5, and arrived there on the following day, on the sixth. 20

Q Where did you take her to? A I took her to the Alta Vista Hotel in Saranac Lake.

Q Is it a hotel or a sanatorium? A Well, my first impression was that it was a hotel, but it was a sanatorium.

Q Had any arrangements been made for her care up there? A Her brother had made arrangements.

Q With whom? A Had made arrangements—I don't recall whether it was through Dr. Ornstein or through a Dr. Mayer of the—up at Saranac Lake. 30

Q You stayed with her for how long? A I stayed with her that week-end.

Q And saw her installed in a sanatorium? A Yes, sir.

Q Now, did you go back there during the month of February? A I went up there again on February 20th.

Q Yes. A Intending to take in the Washington Birthday week-end—Washington's Birth- 40

Gustave L. Goldstein, for Petitioner, direct.

day was, I think, on a Friday of that week, and I did spend the week-end up there.

Q And did you hear from her between the time you had left her on the first occasion and Washington's Birthday? A I believe she wrote me and I spoke to her over the telephone a
10 number of times.

Q Yes. Now, when did you go back? A You mean on that occasion?

Q Yes. A On February twentieth I left and got there on February twenty-first. This time I went up with her brother.

Q And did you see her at that time? A Yes.

Q And what was her condition then? A Why, I would say about the same.

Q Yes. Well, did you take her—go with her
20 to any physician at that time? A I didn't take her to any physician, but I arranged to have a Dr. Leetch at Saranac Lake examine her.

Q Did you go to that doctor with her? A I went with her brother to that doctor and made arrangements for Dr. Leetch to come to the place where she was then staying—she had been removed to a new sanatorium known as Lynch's cottage—and made arrangements for an examination to be made of her that afternoon.

Q And were you present at the time when
30 the examination was made? A I was in the room.

Q And who was it that examined her? A Dr. Leetch made the examination.

Q And when he made the examination did he make any statement to her? A Why, he told me she ought to be well, there was nothing to fear, did not seem to be quite as serious as she might think it to be, because she was in very
40 depressed spirits at the time. He told me in her

Gustave L. Goldstein, for Petitioner, direct.

presence that she had a very bad attack of bronchitis and she had a very bad bronchial condition.

Q Yes? A After he got through with his examination my wife asked me whether there were any other questions that I wanted to ask him and I told him "No," I didn't want to ask him any other questions. "Well," she says, "if you want to ask him any questions, you better ask him now." I said, "No, I don't care to ask him any questions now." 10

Q Why didn't you care to ask him any questions? A Why, I was very peeved and angry. In fact, I think I showed my anger at the time—because I had told her brother that whatever conference or consultation took place between him and Dr. Leetch I wanted to be present, I wanted to hear everything from beginning to end. I figured that Dr. Leetch was not familiar with the history of the case, that before he could make a proper examination of her he would require a history of the case, and I wanted to hear the history of the case. Just before Dr. Leetch came into the room—just before Dr. Leetch came into the room to make the examination—in fact, I didn't know Dr. Leetch was there—her brother excused himself from the room and was gone about a half hour, when he reappeared with Dr. Leetch and I felt he had already given the history to Dr. Leetch, notwithstanding my request and expressed desire to be present at every conference that took place between Dr. Leetch and her brother. After Dr. Leetch left, my wife said, "Why didn't you ask him the questions you said you were going to ask?" I said, "It wouldn't do any good. I don't intend to ask him any questions." And I bawled out her brother in her presence. 20 30 40

Gustave L. Goldstein, for Petitioner, direct.

Q What did you say to him? A I said, "I told you I wanted to be present at that conference." He said, "Well, the ethics of our profession are such that it is not proper or ethical for the patient or the kin of the patient to be present at the consultations between professional associates." I told him, "Well, I don't know much about medical ethics but it struck me rather odd that one who is as close as I am to my wife should not be permitted to be present at a consultation between doctors," and I told them at that time, and I told her that I was going to get another doctor to examine her before I left Saranac Lake. They wanted to know who I intended to get. I told them I will make my own selection and bring them to the sanatorium and make my examination and I told them they wouldn't know who I am bringing up until I bring them up.

Q When Dr. Leetch examined your wife did he say anything to her about her lungs, in your presence? A No, sir.

Q Did he make any comment as to what had been done to her before that time? A Earlier in the day when he—I had arranged for the examination that was held that afternoon, her brother and I were in his office and he asked her brother to state the history of the case, and Dr. Leetch said, "Who let her lung out before?" He no sooner had said that, before he even had a chance to finish that sentence, than her brother interrupted him and said, "Why go into the history of the case now? Let us wait until you go up and make your examination." Referring to the examination that was held later in the day and which I have already testified about.

Q Then you say you decided to have an independent examination made? A Yes, sir.

Gustave L. Goldstein, for Petitioner, direct.

Q And did that examination take place? A
No, sir. I was so confused, I was so shocked, I
was so much at sea by things that were happening
up there that I was really at a loss for anything
to do, and for the next two or three days that I
was up there I just couldn't get my bearings. I
think the Sunday following Washington's Birth- 10
day, Dr. Leetch—that is, her brother and I were
stopping at the Saranac Lake Hotel and Dr.
Leetch was visiting some friends there and he
had just passed through the lobby and I met her
brother there and I said, "I wish you would ar-
range for a conference with Dr. Leetch, I would
like to talk to him." I had made up my mind I
wanted to have a conference with Dr. Leetch
and find out just what he had to say about her
illness. He did approach Dr. Leetch and an ap- 20
pointment was made for that afternoon at three
o'clock at the office of Dr. Leetch. At the ap-
pointed time I and her brother came to Dr.
Leetch's office. We found present at that time a
Mr. Plank or Plant, who was the X-ray man for
Dr. Leetch, and Dr. Mayer and several other doc-
tors who had their offices in the same building.
We all went into the dark room, or the X-ray
room. We were in the dark room and Dr. Plant,
that is Mr. Plant took out a number of X-ray 30
plates, exposed them before a certain light that
they have for reading X-rays and he began to
point out to Dr. Greifinger and Dr. Leetch in my
presence, what these X-rays showed, but as the
X-rays were held up before the light I noticed
the name of my wife, the maiden name of my wife
on one of these plates. They all bore the mark-
ing "Regina Greifinger" and they had the dates
on them. I noted the dates and was surprised
to learn that these plates—there were about eight 40

Gustave L. Goldstein, for Petitioner, direct.

or ten or perhaps more—extended over a period of time of about two or three years; that they had been made at intervals of about two or three months apart. I was so amazed by seeing the dates, some of them running into 1927, some during the time I was courting her, all showed that she had been examined periodically for two or three years prior to the time that I married her. I made no comment in the X-ray room, I simply listened because I felt there was no comment for me to make, as long as the X-ray man was talking at the time; and the X-ray man pointed out to Dr. Leetch that she had a very large cavity; he pointed to a certain area on the plate that indicated a large cavity in her left lung. After we were through in the X-ray room, we entered Dr. Leetch's office. He was using Dr. Mayer's room at that time. Mr. Plant left the conference and Dr. Greifinger, Dr. Leetch and I were the only ones present at this conference. We seated ourselves and I told Dr. Leetch that I wanted to ask him some questions. I says, "Doctor, has my wife tuberculosis?" He says, "Yes." I says, "Are you sure about it? Is there any question about it?" "No question at all about it." I says, "Doctor, can you give me an idea how long my wife has suffered from this condition?" He says, "Well," he says, "from the X-ray plates that I have just seen I would say that she has been suffering from tuberculosis at least for the last two or three years." I says, "Has she got a very serious condition?" He says, "She has a very bad condition in the left lung." I told him that I heard Mr. Plant make some remark about a cavity in the left lung and I asked him what that cavity condition was. He told me she had a very large cavity, indicating by his fingers that

Gustave L. Goldstein, for Petitioner, direct.

her cavity was at least an inch square in dimensions. I asked him how long, in his opinion, a cavity of that size would take to heal and he told me a very long time. In fact, he told me it might become necessary to perform some surgical operation. I told him that I had never known the treatment of tuberculosis at any time called for surgical operations and he told me, "Yes," he says, "it may be necessary to perform an operation to relieve the pressure on the lung." I asked him whether he was sure that such an operation might become necessary and he told me it was hard to say, he would wait about two or three months to see how she progressed. I asked him how long he thought that she would be up there. He said, "The way I figure," he says, "she should be up here about a year, unless she makes unusual progress." I then asked him whether, in his opinion, it was a wise thing for Reggy to have married me. He said, "Well, it is hard to say, but," he says, "I guess it might have been better for her not to have married you." I asked him other questions of a similar nature and after I had gotten through—and, frankly speaking I really conducted a very rigorous examination of him for a period of about a half hour or so—after I got through, her brother in an attempt to relieve the tension of the situation said, "Well, doctor—" (interrupted)

Mr. Lane: I object to that.

The Court: Yes. Try to be more brief

The Witness: After I got through, her brother said, "Well, that was a very vigorous—" (interrupted)

Mr. Lane: I object to that, what her brother said.

Gustave L. Goldstein, for Petitioner, direct.

Mr. Unger: To Dr. Leetch?

Mr. Lane: Yes, to Dr. Leetch or anybody else out of her presence.

The Court: I will sustain the objection.

10 Q Don't say what her brother said. A Uh huh. I told Dr. Leetch, "Doctor," I said—(interrupted)

Mr. Lane: I object to that. I think we have had enough of that, if the Court please.

The Court: I think all we want to impress on the Court is that Dr. Leetch finally told you that your wife had tuberculosis and had had it for two or three years. Now, that is enough.

20 Mr. Unger: I think, perhaps, that part of the evidence has not gone in. I am entitled to show what answer was made as to his charges by Dr. Greifinger, bearing in mind he was the man that was treating her during that time. I think it is a logical conclusion to this—

The Court: Who, Dr. Greifinger?

Mr. Unger: Yes. He was there at the time.

30 Mr. Lane: I withdraw the objection, because I understand Dr. Greifinger will say what he said, anyway.

Q Proceed. A After Dr. Greifinger had made a remark that I subjected Dr. Leetch to a very vigorous cross examination, I said to Dr. Leetch in a very—I seemed to be very angry—I was very angry at the time, I said, "Doctor, this is the first time I have been able to get any
40 information as to the nature of my wife's illness;

Gustave L. Goldstein, for Petitioner, direct.

this is the first time I have learned that my wife has tuberculosis." I said, "This fellow sitting here—" pointing to her brother, Dr. Greifinger —"and Dr. Ornstein have both been telling me all along that my wife only has bronchitis or a very severe conditon of bronchitis." I said, "I think it is a shame that doctors will conceal a condition of that kind." I said, "By doing that they have deprived me of my independent judgment as to what course of action to pursue in the treatment of my wife." I said, "I think they are both a disgrace to their profession." Dr. Greifinger sat by and he didn't say a word. In fact, during the entire conference with the exception of the remark he made that I had subjected Dr. Leetch to a vigorous cross examination, he didn't say a single word, he simply sat there ashen white and made no comment at all. Well, when we got out of the conference room it was then already about five o'clock or so that afternoon. We both wanted to go up and see my wife; we were walking up to the Saranac, and I refused to walk with him. I told him I didn't want to have anything to do with him. We went up to see my wife and she asked me what Dr. Leetch had said. I told her that Dr. Leetch had said that she would be well in a very short time—I didn't want to cause her any alarm—that she had nothing to worry about, a little patience and courage and she was to be well shortly. That night we left for Newark and I returned to my office the following morning.

Q After that you brought this suit? A That same day that I returned from Saranac Lake I saw you, Mr. Unger, and I retained you for the purpose of bringing this annulment action.

Gustave L. Goldstein, for Petitioner, direct.

Q Prior to the time that you were informed by Dr. Leetch, on February 24, 1929, that your wife undoubtedly had tuberculosis, had anyone given you that information? A In all the time that I saw her—(interrupted)

10 The Court:

Q Just say Yes or No. A No, sir.

By Mr. Unger.

Q Had you known it prior to that time at all? A No, sir.

Q If you had known prior to the time when you married your wife that she had been suffering with or was afflicted with tuberculosis, would you have married her? A Absolutely not.

20 Q Now, you made another visit to Saranac Lake? A Around July of this year I went up to Saranac Lake again.

Q And what was your purpose in going up there at that time? A My purpose in going up at that time was to see Dr. Leetch, Mr. Plant and Dr. Brown and arrange for the taking of depositions there.

30 Q And while you were there did you meet your wife? A On the third day that I was there I met my wife.

Q Did you talk to her? A Yes, sir

Q About her illness? A Yes, sir.

40 Q What did you say to her? A I came up to the place where she was staying. As I entered the room—she was fully dressed at the time—she threw her arms around me and began to sob and cry. After she had come to herself I told her to lie down and we began to talk. I told her she seemed to be looking very well, she

Gustave L. Goldstein, for Petitioner, direct.

had taken on a lot of weight and I understood from her physician that she would return to Newark shortly after Labor Day. I told her I was very glad to hear she had made such splendid progress, and then we talked about a number of other matters. She told me that I was a fine fellow for bringing this action and she upbraided me for it. She told me that I certainly must have loved her a whole lot if I could not overlook this illness of hers, that love called for sacrifices. I told her that under the circumstances of this case it did not call for any sacrifice at all; she had deceived me, she had kept from me a condition, which, had I known, I never would have married her; I didn't think it called for that sacrifice. She then asked me, she said, "Well, the thing I really have most against you is that you brought the action when you did. Why couldn't you wait in bringing the action? Couldn't you wait at least until I had gotten better and could withstand the shock of it?" I told her that as a result of conferences with my counsel that we decided that prompt action was the only thing for us to take. We talked about other things. I tried to assure her and console her with whatever ways I could under the circumstances and I told her that I was going back to Newark that night. This was on a Saturday night. She begged me to stay a little while. She said, "Why don't you take a vacation for a week or so up here?" I said, "No, I am not in a mood for vacations right now." She told me that she would appreciate it if I would at least stay the following day, because none of the people in the house knew of this action and it was very embarrassing to her, that her husband, she being only married a short time, should not come up to see her and had not

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Gustave L. Goldstein, for Petitioner, direct.

seen her for so long a time and had come up and stayed only a few hours. She prevailed upon me to stay until the following day. I came up the following morning and we spoke again. She told me that she regretted that she had ever married me and the reason for it was that my code of
10 doing things and my ways of doing things was too perfect, that I could not overlook any shirking in any individual. I told her, I says, "Well," I says, "now, I cannot agree with you." I says, "You should have told me about this condition. Why didn't you tell me that you had tuberculosis?" "Well," she said, "I did tell you." I says, "You did not." She said, "Well, didn't I tell you that I had a nervous breakdown?" I said, "What does a breakdown mean to any-
20 body?" I said, "In the first place, you never told me you had a breakdown, and, in the second place, a breakdown doesn't mean tuberculosis in my language." We continued to talk along those lines for a little while, and then she told me, she says, "You know," she says, "you know, you would have married me if I had told you about this." I says, "I would not; I never would have married you if I knew about this." I said, "Why didn't you tell me?" I said, "If you would have
30 told me, at least you would have given me an opportunity to decide for myself. You never even presented the opportunity for me to decide." She said, "Well, I wanted to tell you," she said, "from the time I met you, I loved you and I loved you very dearly and I wanted to marry you and at the same time I wanted to tell you about my illness and the fact that I had tuberculosis, but," she says, "you know how our Jewish folks are, a girl wants their home, they want to marry. My folks told me that I should
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Gustave L. Goldstein, for Petitioner, cross.

not tell you, they all urged me not to tell you. They were afraid if I told you you would not marry me." She says, "We had more fights home, we discussed the matter so often, and the conclusion was that I was not to tell you and I did not tell you."

Q Did that end the—(interrupted). A That ends—that was really the pith and substance of it. The conversation may have been longer in detail. 10

Q And you left? A No. I sat around after that. We talked. She came over to me occasionally and caressed me and put her arms around me, told me that she still loved me, and so forth.

Q Have you lived with her as man and wife since December, 1928? A Well, I lived with her up until the time she went to Saranac Lake. She went to Saranac Lake— 20

Q In December? A No; she went to Saranac Lake in February.

Q In February. Since that time you have never lived with her? A No, sir.

Cross examination by Mr. Lane.

Q Mr. Goldstein, you are a lawyer? A Yes, sir. 30

Q Admitted to the bar how long? A Since February, 1921.

Q You are how old? A I will be thirty in December.

Q And why, upon this last occasion when you went to Saranac, did you go to see your wife? A I was up in Saranac for two days.

Q Yes, you told us. A I was up in Saranac for two days and on the third day I just got an impulse that I wanted to see her. 40

Gustave L. Goldstein, for Petitioner, cross.

Q I know, but what induced that impulse that you wanted to see her? You were suing your wife for an annulment for this concealment and fraud on you and you were there trying to get testimony in respect to that case. Now, why did you go to see your wife who was sick? A I
10 simply obeyed a human impulse to see her at that time, Mr. Lane.

Q So it was just a human impulse? A Absolutely.

Q And you went up to console her? A Not so much to console her as to see how she was.

Q Were you trying to console her? A I did, yes, sir.

Q But you told her that she had fraudulently deceived you? A That was after she had provoked the remarks. I had no intention at all
20 to discuss that case with her when I went there.

Q Well, what were you going to discuss? A If you will permit me to tell the circumstances under which I saw her, I will make it very clear to you, Mr. Lane.

Q What were you going to discuss, is the question? A I just wanted to see her, that is what I wanted to do. I wanted to see her for a few minutes and in an endeavor to see her I
30 asked her own doctor, Dr. Mayer, to make the appointment for me to see her. I didn't want anyone to think I was trying to take advantage of her. I made that appointment with Dr. Mayer and I told Dr. Mayer that I would go up to see her only on one condition, if he remained present at the time I saw her. Dr. Mayer told me he was a very busy man, he could not spend very much time with me, that if he went up there he would be only able to spend five or ten minutes,
40 five or ten minutes, and I said, "That is all I

Gustave L. Goldstein, for Petitioner, cross.

want to do." So, when—before I got back, Dr. Mayer did make that appointment, and, just as I approached the place in a cab, I saw Dr. Mayer tearing down the road in his own car; he had already departed; I was already at her cottage, which is quite a distance from the village itself, and, as long as I was there, I felt I would see her, and those were the exact circumstances under which I did see her. 10

Q So that, prior to your seeing her, there was in your mind the fact that it might be said that you were attempting to take advantage of her? A No; I did not think of considering it from that viewpoint, although that idea may have been somewhat present in my mind.

Q You told us a moment ago— A Yes, that is right. 20

Q You told us a moment ago that you went all through this attempting to make an appointment with Dr. Mayer because you did not want anybody to think you were going to take advantage of her? A That is correct.

Q Then what do you mean by saying that did not enter your mind? A I told you before, Mr. Lane, that may have lingered somewhere in my mind, the idea of not having my actions misinterpreted. 30

Q All right. So that you did have in your mind the fact that your actions might be misinterpreted? A Yes, sir.

Q And then you went to see her? A I did.

Q And you found that Dr. Mayer was not there? A I saw him leaving.

Q You went into this conversation, she had provoked a remark from you in which you told her that she had deceived you, is that right?

A That is right. 40

Gustave L. Goldstein, for Petitioner, cross.

Q The consoling, I suppose, ended about then? A No, sir; it did not.

Q It continued after that? A In fact, during all the time that I was up there, every time she provoked a situation that seemed to bring tears from her and seemed to unnerve her, I
10 did my best to bring her around, and when I left her Saturday night and when I left her Sunday night I left her in very high spirits, all the circumstances considered, in fact, she seemed to be very cheerful. She told me, when I came into her room to see her, that if I had not come up there to see her during my visit, she would have thought it was the end of everything for her, everything that she ever hoped for in life. Those
20 are the exact words she told me, when I entered her room, and she told me, when I left her at Saranac Lake, that she was very glad I had come up to see her.

Q Now, I didn't ask you that. You continued to console her after you charged her with fraud on you? A Yes, sir.

Q And you did discuss the case and the merits of the case? A She discussed the thing with me that called for answers from me, Mr. Lane.

30 Q Can you answer responsively? That was discussed, wasn't it? A The case was discussed, yes.

Q And then, without anybody else being present, you went back the next day? A That is right.

Q Well, did you think then or was there in your mind the thought that this action on your part might be misinterpreted? A. The probability was there.
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Gustave L. Goldstein, for Petitioner, cross.

Q Did you make any effort or attempt at that time on that Sunday to get Dr. Mayer there also?

A No, sir; because I could not expect him to spend any more time on me.

Q Well, why did you go back the second time? A She requested me to do so and she requested me so earnestly that, although my plans called for my return on Saturday night, I remained over until Sunday.

10

Q Was the case discussed on the second occasion? A Yes, sir.

Q And the respective merits of your contention and hers gone into? A I did not attempt to argue any merits with her, Mr. Lane.

Q Did you tell her on the second occasion that she had deceived you? A Yes, sir.

20

Q A repetition of the first occasion? A (Witness nods yes.)

Q In effect? A Practically.

Q Now did you tell her on the first occasion or the second occasion or on either of the occasions that you knew that she had not told you, but that it was best for you both that the marriage be annulled and that all she had to do was to say she had not told you and you would get your decree? A That is an absolute—that is absolutely not so, Mr. Lane. The only conversation that was held in that respect was this: She told me, that is, she asked me to drop this annulment suit, she asked me whether some plan could not be worked out whereby I would take her back and give her a chance to see how she progressed for the next year or two, and, if she did not progress during the next year or two, then she would not stand in my way for freedom.

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Gustave L. Goldstein, for Petitioner, cross.

Q Well, how did that come about? A It was her own suggestion. She said, "You are a lawyer," she said, "you ought to be able to work out some way out of this thing." I said, "Well, there are some things lawyers cannot work out."

10 Q Yes? A I said, "I cannot see a way out of this."

Q Who said that? A I did. I said, "I cannot see a way out of this except that I go ahead with my action."

Q Well, did you say that or did you say just exactly what you said a second ago, that you could not see your way out of it if she stuck to the fact she told you? A I told her the only way out of the whole situation, as far as I was concerned, was to go ahead with the annulment suit.

20 Q That is not what you said in the beginning. She said you were a lawyer, you could work something out and you told her that you could not see any way out. The second time you added, "except to go on with my suit?" A That is what I meant when I said I couldn't see any way out.

30 Q Isn't that what you said that you couldn't see any way out unless she stated that she had not told you—(interrupted)? A No, sir; that is absolutely not so.

Q But the fact that she had told you and the fact that she had not told you are the respective contentions which were discussed? A Oh, it was discussed, yes, sir.

Q And the fact is this annulment suit was discussed? A Yes, sir.

40 Q And some way out was discussed? A By her.

Gustave L. Goldstein, for Petitioner, cross.

Q Yes, by her. You knew, of course, as a lawyer that if you had been told you could not succeed in your annulment suit, didn't you? A What was that question?

Q You knew, as a lawyer, that if you had not been told before the marriage with respect to this tubercular condition that you— A Yes. 10

Q —could not succeed? A That is right.

Q You knew when you went there, didn't you, that the important thing in this case was the question as to whether or not you had been told? A Very naturally.

Q And you talked with her alone with respect to the fact as to whether you had been told or not, didn't you? A We both discussed it.

Q And she told you that she loved you very much, didn't she? A Yes, sir. 20

Q Upon both occasions? A Yes, sir.

Q Now, don't you remember that when she told you that she loved you, you said to her, "If you love me so much, all you got to do is to say that you did not tell me?" A That is absolutely not so, Mr. Lane.

Q That was not the first time that you had discussed with her divorce or annulment, was it?

A That was the first time I ever spoke to her in all the time that I knew her about annulment or divorce. 30

Q Don't you remember an occasion—perhaps it is the same one you have already testified to, in December, in which your wife was crying in bed and that you came in to her and talked with her? A No, sir; nothing was ever said about it, Mr. Lane, not a word.

Q Well, such a conversation did take place in your home when you found her sobbing, I think you said— A Yes. 40

Gustave L. Goldstein, for Petitioner, cross.

Q —as if her heart would break? A I didn't hear the question.

Q I say, there was an occasion in December of 1928, when you found your wife, or heard your wife sobbing as though her heart would break and you went in bed with her to console her?

10 A Yes, sir.

Q And upon that occasion she said, as I understood it, what? A She told me that she should have told me that she was sick, before she married me, and that she had dragged me into this thing innocently and now I was suffering for it, or that was about the pith and substance of it. That is all there was to it.

20 Q To which you replied? A I simply consoled her and told her there was nothing to worry about, she had had that cold in February, that was nothing serious, she seemed too well all the time, and I consoled her in different ways, that I would try to console a person under those circumstances.

Q Let us see. She cried and told you that she should not have dragged you into it and she told you that she should have told you? Told you what? A That she had been sick before she married me.

30 Q But you knew that and she knew that you knew that? A Exactly, and I told her that I knew that.

Q Well? A And I referred specifically to the illness that she had in February and that is where the conversation ended.

40 Q Yes. But she was telling you or told you that she should have told you something. Now, the thing that she should have told you could not have been her illness of which you knew and of which she knew you knew? A I didn't know

Gustave L. Goldstein, for Petitioner, cross.

then, Mr. Lane, what she might have been able to tell me then.

Q Well, why didn't you ask her? A Because the circumstances were such, she was crying so violently and sobbing so violently, rather, that my only effort at that time was to console her and I had nothing to suspect. I didn't know that she had been sick before; I didn't even want to question her about the thing; I was trying to console her. 10

Q You had nothing to suspect? A No, sir.

Q Now, wait. You had nothing to suspect when this woman was in bed crying as though her heart would break and when she said to you, "I shouldn't have dragged you into this thing, I should have told you—" A Exactly, I did not—(interrupted). 20

Q Wait. —you mean to say that to your lawyer mind there was nothing suspicious in that? A Nothing suspicious, Mr. Lane, because I referred her back to that illness in February and she seemed to say that. That is the way the conversation ended.

Q Well, she seemed to say that that was the thing about which she should have told you, when you knew and she knew that you knew? A The only way I can answer your question, Mr. Lane, is that I do not know what she had in mind. I did not press the question. 30

Q Why didn't you? A It did not occur to me.

Q Why not? A Because the circumstances of the case called more for consoling her. She was very ill at the time. I didn't want to discuss any prior illnesses or anything else that she may have referred to at the time. I simply wanted to console her. 40

Gustave L. Goldstein, for Petitioner, cross.

Q Did you know she was referring to a prior illness? A I don't know whether she was. She most likely was.

10 Q Did you think so at the time? A She most likely was, but it did not occur to me to question her about it, and I did not question her about it. I did not ask her a word about it.

Q You remember and have remembered ever since that time the exact language she used?

A I am not—I cannot say I remember the exact language. It is the substance of the language, although I may have rendered it in a conversational way.

20 Q Why didn't you ask her the next time, or some other time when she was not sobbing so that her heart would break, as to what she meant when she used the words, "I should not have dragged you into this, I should have told you?"

A Mr. Lane, that girl was so sick at that time, she was coughing so violently, she had such difficulty in bringing up sputum, she had such a fever all the time that it was no occasion or time to discuss with her anything of the nature that you want me to tell you about now, and it never occurred to me to ask her about those things at that time.

30 Q That did not prevent you when she was sick at Saranac on the last occasion you saw her—(interrupted)? A Because on that occasion—

Q Wait. I am not through.

The Court: Wait a minute.

40 Q —after this annulment suit was started, from telling her in effect that she lied to you and that she fraudulently deceived you; it didn't hurt

Gustave L. Goldstein, for Petitioner, cross.

you then to say that, did it? A Of course, at that time she was already apparently recuperated; she was on her feet; she had taken on weight; she weighed at that time, she told me, at least twenty-five or thirty above normal, whereas at the time in December, she was probably under weight about ten pounds. In other words, at that time she weighed about ninety-five or one hundred pounds and at this time now she weighed about one hundred and thirty or one hundred and forty pounds, and she seemed to be well, and Dr. Mayer told me the only reason he was keeping her at Saranac Lake at that time was to get over the hot spell of the summer, that she would return directly after Labor Day and I would see her in the city then. 10

Q So when she was up there this last time she was apparently all right? A She seemed to be. She seemed to be as well as she looks now in the court room. 20

Q And that is the reason why you talked to her in the way you did? A I don't quite understand your question, Mr. Lane.

Mr. Lane: Withdraw it.

Q I thought you said that you went up there to console her? A I did not go up to console her, Mr. Lane. 30

Q Then why in the world did you go there? A I told you I went up there, Mr. Lane, only for one purpose.

Q Yes, I know that. A I had been up there two days or two and a half days and I was seized with an impulse or desire to see her and I wanted to see her for a few minutes. 40

Gustave L. Goldstein, for Petitioner, cross.

Q What was this desire or impulse due to, love or affection or what? A I don't know what it may have been due to.

Q Did you love your wife at that time? A No, sir; I cannot say I did.

Q All right. Then what was this impulse?
10 A It was just an impulse perhaps from my long relationship with her. I don't know how I can explain it, except the idea entered my mind and I thought I would go at that time and see her for a few minutes and I did see her for a few minutes.

Q So you cannot tell me what the impulse was due to? A No.

Q It was not due to love, it was not due to affection. Might it have not been due to the only
20 concrete thing that has been suggested so far, and that has been suggested by me, for you to get an admission out of her or an agreement by her that she would let this suit go through? A No, sir; Mr. Lane.

Q Well, can you think of any other concrete thing? A Mr. Lane, the only way I can answer your question is that if you or anyone else can explain the human emotions that cause us to do or not to do things, then perhaps I can define
30 my answer in that way.

Q But this human emotion that you cannot define, which you said is not due to love and affection, was sufficient to bring you there not once but twice, that is so? A The first time the human emotion brought me there, the second time I came at her specific request.

Q Now, don't you remember on this occasion that you were talking with her when she was in bed sobbing, that she said, "I should not have married you, you should not have been dragged
40

Gustave L. Goldstein, for Petitioner, cross.

into this, and I will let you get a divorce." Do you remember that? A No, sir.

Q And don't you remember that your reply was, "It won't be a divorce, it will be an annulment." A No, sir; no, sir; that is absolutely not so, Mr. Lane. I never spoke to her about divorce or annulment until that visit up at Saranac Lake in July of this year. Prior to that time I never discussed it. It never entered my mind at all. The time I made up my mind I was going to bring this action was the week end of Washington's Birthday, when I got back on Monday, the day after I got back, that very same day I saw Mr. Unger and consulted him for the purpose of bringing this action and this was the first time I ever thought of it and it was the first time it ever entered my mind because it was the first time I knew she had tuberculosis.

Q Never discussed divorce with her? A No, sir.

Q Never discussed annulment? A No, sir.

Q Never discussed cases of that kind with her? A No, sir.

Q Never discussed law books with her of that kind? A Why would I discuss law books with her?

The Court: Answer the question.

The Witness: No, sir.

Q I am sorry, but she says you did? A No, sir.

Q You never brought law books home to her—
A During—

Q Wait. —and read out of those law books divorce cases and annulment cases and told her about them? A Mr. Lane, during the illness

Gustave L. Goldstein, for Petitioner, cross.

of my wife I brought home numerous law books and every law book I ever brought home is still in that house today. I brought law books during that winter spell because I was going to study up subjects in which I was interested.

10 Q On divorce? A There was not a single book on divorce, because I was not interested in that subject.

Q Or annulment? A Or annulment, or books on that subject. And the books are in her house now.

Q Did you discuss any of the cases reported in these law books? A No, sir.

Q With her at any time? A No, sir; never.

20 Q You called her up at Saranac after you returned, didn't you? A I called her on the following Saturday.

Q Yes. A I called her on the phone.

Q Yes. Why? A I wanted to find out how she was feeling.

Q Yes. That is another human impulse? A Yes, sir.

Q Not due to love and affection? A No, sir.

Q Well, why were you concerned? A I was afraid that perhaps the reaction of my visit may have given her a set-back.

30 Q Then the reaction of your visit even in your own estimation was not quite so consoling as you attempted to say? A It may have given her a set-back.

Q Why? A And I wanted to call up and see how she was feeling, and she said she felt much better.

40 Q Why did you think it would give her a set-back? A I don't know. I asked Dr. Mayer even before I saw her whether he thought there would be any objection to my seeing her. He said there

Gustave L. Goldstein, for Petitioner, cross.

would be no objection. In fact, he said, "She would most likely be glad to see you."

Q You knew she was represented by counsel?

A Yes.

Q You did not consult with her counsel as to whether you should see her? A I did not think it was necessary.

10

Q You consulted with her physician, not her counsel? A Because he happened to be close at hand. He was across the street from where I was stopping.

Q Did you consult with your own counsel as to whether you should see your wife under those conditions? A No, sir.

Q You were acting as your own counsel? A I was not acting as my own counsel. I was simply a party to an action.

20

Q But you could not forget your law? A I don't know. I suppose it would be a difficult thing to forget.

Q Are you sure you did not consult your own counsel? A No, sir.

Q While you were up there did you telephone Newark? A I did, yes.

Q To where? A I spoke to my office. I believe I spoke to Mr. Unger.

Q Yes, your counsel. A Yes, sir.

30

Q Before you saw your wife? A Yes, sir.

Q Did you tell him you were going to see your wife? A Yes, sir.

Q Did you tell him you were going to see your wife?

Mr. Unger: Objected to. Confidential.

The Court: I will sustain the objection. Isn't this a confidential communication?

Mr. Lane: The question cannot be objected to upon that ground, if the Court

40

Gustave L. Goldstein, for Petitioner, cross.

10 please. I am not asking the lawyer to disclose a confidential communication at all. If Mr. Goldstein wants to plead his privilege—although I do not think it exists when I am interrogating the client on cross examination in that way—I shall not press it, but it is up to the client to plead that privilege.

Mr. Unger: I objected to it on the ground that the information would be confidential.

The Court: I will sustain the objection.

Q Were you advised by Mr. Unger over the telephone with respect to this prospective visit to your wife?

20 Mr. Unger: Objected to for the same reason.

The Court: The same ruling.

Q Do you, yourself, Mr. Goldstein, object to answering those questions?

Mr. Unger: I object to the question.

The Court: No. That is perfectly all right.

30 Mr. Unger: I object to that question, if your Honor please, upon the ground that it is immaterial whether he objects to it, so long as the objection to the question has been sustained.

Mr. Lane: The law is settled that the privilege of counsel is not the privilege of counsel, it is the privilege of the client and must be asserted by the client.

40 The Court: I direct the witness to answer this question.

Gustave L. Goldstein, for Petitioner, cross.

The Witness: I will be governed by the ruling of my counsel in the case.

The Court: You have got to say whether you want to plead this privilege or not.

Mr. Unger: Well, if your Honor please, I would ask that the question be read to him. 10

The Court: Yes, read the question.

(Question read as follows: "Do you yourself, Mr. Goldstein, object to answering those questions?")

The Witness: What questions are they, specifically?

The Court: Whether you consulted with Mr. Unger over the telephone in regard to this case, and, if you did, what did you say? Now, do you object to answering those questions? 20

The Witness: I did talk to Mr. Unger about—(interrupted).

The Court: Now, tell us if you object or not. That is the first thing to find out.

The Witness: No I have no objection.

The Court: All right, then, go ahead.

The Witness: I called up Mr. Unger because I wanted to make arrangements—(interrupted) 30

Mr. Unger: Just a moment. You have answered the question.

Q Very well. What time did you call up Mr. Unger? A I called up Mr. Unger Saturday morning.

Q What time? A Some time during the morning, I cannot recall, it was before—(interrupted). 40

Gustave L. Goldstein, for Petitioner, cross.

Q Did you— A It was before the visit to my wife.

Q What time did you see your wife? A I saw her in the afternoon, late in the afternoon.

Q What did you say to Mr. Unger?

10 Mr. Unger: Now I object, if your Honor please, on the ground that what he said to me is confidential, and it makes no difference whether or not the witness is willing to answer, because your Honor has directed him to answer, but I still interpose my objection.

The Court: Well, Mr. Unger, if he has no objection to answering, how can you claim the privilege for him?

20 Mr. Unger: Because your Honor has directed him to answer and he had no choice, he no longer had any choice.

The Court: No, I have not directed him to answer. I asked him if he was willing to answer and he said, "Yes," and then I said, "Go ahead and answer."

Mr. Unger: I nevertheless put my objection in.

30 The Court: I think that if he is willing to answer he can answer. I do not think that would be a privileged communication.

Mr. Unger: All I ask for from your Honor is a ruling on my objection.

The Court: I say that if he chooses to answer, he may do so.

The Witness: I do not have the question before me now.

40 (Question read as follows: "What did you say to Mr. Unger?")

Gustave L. Goldstein, for Petitioner, cross.

The Witness: I think, under the circumstances of the case, your Honor, I will plead the privilege of communication.

The Court: All right. Then I won't require you to answer.

Q After the first talk that you had with your wife and before you had the second talk with your wife, did you call Mr. Unger again? A What was that question? 10

(Question read as follows: "After the first talk that you had with your wife and after you had the second talk with your wife, did you call Mr. Unger again?")

A No, sir; no, sir. 20

Q I understand that you were quite incensed at Dr.—what is his name—Greifinger?

Mr. Unger: Greifinger.

Q —Greifinger, as a result of your consultation with Dr. Greifinger and Dr. Leetch; is that right? A Yes, sir.

Q So incensed that you did not walk up the street with him? A That is right. 30

Q When did that resentment pass away? A It never passed away.

Q It never passed away? A And it never will.

Q And you continued to be just as resentful to the extent that you would not even walk up the street with the man from that time down to the present time? A Yes, sir, with the exception of the hour or so, hour or two that we spent in the room together with my wife, because I 40

Gustave L. Goldstein, for Petitioner, cross.

did not want her to think at that time that there was anything wrong. With that exception I have been—(interrupted).

Q With that single exception? A With that single exception, yes, sir.

10 Q You came down from Saranac with Dr. Greifinger on the train, didn't you? A Yes, sir.

Q And you bought him an apple at the—on the— A No, sir.

Q You don't remember that? A No, sir. As a matter of fact—

Q Do you remember having dinner with him the night before you came back at the Hotel Pine? A I think we had dinner together.

20 Q Yes, but here you were having dinner with a man against whom you were so resentful you wouldn't even be seen on the street with him? A Because at that time I felt, Mr. Lane, there were a couple of things I wanted to tell him, and I told him, too.

Q Then your resentment did not go to the extent of your refusing to eat with him? A Because I felt there were some things I wanted to tell him.

30 Q Can you answer the questions or can't you, instead of going into these long explanations? A That resentment continued, Mr. Lane, notwithstanding the fact that I ate with him.

Q Now, why did you eat dinner with a man in a hotel upon the night of the very day that you were so incensed with him that you would not even walk up to your sick wife's house on the same side of the street with him? A I did not say I would not walk up on the same side of the street with him.

40 Q Well, with him, then? A That resentment is still with me.

Gustave L. Goldstein, for Petitioner, cross.

Q Why did you eat with him? A Because there were some things I wanted to tell him yet and I—

Q Who paid for the dinner? A I can't remember that now. He may have paid or I may have paid. I don't know who paid for it.

Q Do you remember that you came down in the train—you have already said that you came down in the train together? A That is right. 10

Q Do you remember having breakfast with him in the dining car? A No, sir; we didn't have any breakfast in the dining car. There was no diner to that car.

Q All right; did you have breakfast with him? A No, sir.

Q Never mind whether it was in a dining car or hotel? A No, sir, I did not. 20

Q Do you remember when you got off the train you came home in the car with him? A I had no choice in the matter.

Q Did you? A He followed me.

Q All right, he followed you. Did you? A That is the absolute fact.

Q And do you remember that you asked him to take your bag home? A No, sir. I do remember this. It was my suitcase. I am trying to tell you what—(interrupted). 30

Q I didn't ask you that. Your counsel will give you that opportunity, as you should know, on re-direct. Did you ask him to take your bag home? Yes or no? A Yes.

Q And the day before you would not walk up the street with him? A That is right.

Q And the resentment continued and has continued right down to the present time? A That is right.

Q Right? A Yes, sir. 40

Gustave L. Goldstein, for Petitioner, cross.

Q Now, when did you first see Dr. Ornstein?

A The first time I ever met Dr. Ornstein in my life was in February, 1928.

Q Yes. A And I fix the date as February seven.

10 Q Yes. A I saw him on an occasion which I have already testified to, for a few minutes late that evening.

Q At the home? A At the home.

Q After Dr. Ornstein had made a complete examination—or, rather, after Dr. Ornstein had been with your future wife— A Yes.

Q —what did he say to you? A Well, he told me that she had a very bad cold; she would be well in about a week or so; told me I had a very nice girl, a very lovely girl.

20 Q Yes. A Used other words of that kind, characterization, and told me that; then stated in the presence of all of us that he was in a very great hurry to get home. That was the only conversation that took place. The lateness of the hour was the thing that occasioned that remark.

Q Do you remember his taking out a pencil and drawing a sketch there at that conference? A No, sir.

30 Q Did he ever? A No, sir. You mean, at that conference?

Q At any time? A No, sir.

Q Who was the doctor who told you about the trachea and the other organs being pressed together? A Dr. Ornstein.

Q When? A In February, 1929, the present year—I mean, in January, the latter part of January, 1929.

Q Where? A At his office.

40 Q And did he at that time take out his pencil and sketch it for you? A No, sir; he

Gustave L. Goldstein, for Petitioner, cross.

had her before the fluoroscope entirely disrobed and he attempted to point those things out to me before the fluoroscope.

Q Now, was that the first time that he had referred to these organs being disarranged or something the matter with them? A Yes, sir; that was the first time.

10

Q And you are sure then that at this time that you saw him in February he said nothing about that condition? A Absolutely not, Mr. Lane.

Q And don't you remember now that he did say something about that condition and don't you remember that you said you didn't care? A No, sir; that is absolutely not so.

Q As I understand it, your wife had been sick with this cold—or, your future wife had been sick **with this cold**, confined to her bed for upwards of how long? A You are referring now to the February cold?

20

Q Yes. A Entirely, the entire period was about a month.

Q And do you remember when it was that she went to bed with it? A I would say around the latter part of January, 1928, and continued right through until about the latter part of February, 1928.

30

Q And that cold you thought, from what was told you, was an ordinary cold? A Either that or pneumonia.

Q Well, but she had been suffering with it for a month? A Well, that is what I was told, Mr. Lane.

Q Didn't you think it was rather serious, more serious than a simple cold to keep a woman in bed for a month and require the attention of a specialist from New York? A I thought it

40

Gustave L. Goldstein, for Petitioner, cross.

must be a serious cold, but that is about all I did think it was. That is what I was told it was and I took it for granted it was so.

Q Did you know what Dr. Ornstein's specialty was? A No, sir.

Q Did you inquire? A No, sir.

10 Q Why not? A All I understood was that he was a very good doctor.

Q He was a specialist? A I didn't know he was a specialist.

Q You did not inquire? He was a New York man, wasn't he? A Yes.

Q Coming over here to Newark? A That is right.

Q And you did not inquire as to why this New York man should be imported? A No, sir; except for the fact that he was supposed to be a very good doctor. That is all I knew.

Q Doctor for what? A Well, I didn't know.

Q Well, you knew he was not a general practitioner? A I didn't know that night.

Q You did not? A I never heard of Dr. Ornstein until that night.

Q I don't care whether you had never heard of him before, I am asking you whether or not you assumed that man, this doctor, brought over from New York was a general practitioner? A I made no assumptions, Mr. Lane. I was simply told he was a very good friend of the family, that he was a friend of her brother's, he was a very good doctor and that was the reason they were using him, and his services were available free. Otherwise, no other thing suggested itself to my mind.

30 Q After she got out of bed in the latter part of February, was there any condition of cold or other condition of illness between that time and the date of the marriage? A No, sir.

Gustave L. Goldstein, for Petitioner, cross.

Q Do you remember a discussion between you and Dr. Greifinger with respect to your future wife having children? A No, sir; I never spoke to him about that.

Q Do you remember that Dr. Greifinger told you that your wife ought not to have children at once? A Never said a word about it, not in all the time that I knew him. 10

Q Do you remember that the matter of sexual intercourse was discussed just before the marriage? A No, sir; it was never discussed.

Q Nothing of that kind was ever said? A Absolutely not. In fact, Mr. Lane, it was not until I personally discontinued sexual intercourse in December of that year that I ever thought that intercourse might be harmful to her, as a volunteer on my part, it occurred to me, even as a layman that perhaps, in view of her very serious illness at that time, it might be well to discontinue it, and so that condition continued up until the time she went to Saranac Lake; I abstained from intercourse altogether and I have never had intercourse with her since December, 1928. 20

Q Don't you remember that you talked with Dr. Greifinger with respect to it and Dr. Greifinger told you what the report of Dr. Greifinger was and don't you remember that Dr. Greifinger told you that if you were married the intercourse should be in such a way as not to result in children? A Absolutely not. 30

Q And don't you remember that he gave you protectors for your use? A That was my own choice.

Q I don't care whether it was your own choice or whether it was not. I am asking you whether or not he did not give you protectors?

A He told me he got them free and he gave them to me free. 40

Gustave L. Goldstein, for Petitioner, cross.

Q Yes. And that was before marriage? A No, sir; not before the marriage.

Q How soon after the marriage? A Why at different times, I would ask him, whenever I needed them, I would ask him for them.

10 Q And you always used them? A Yes. And he was not the only source of them.

Q I know that. Don't you remember that when he told you that, you told him that you could get them yourself? A I don't know what I may have told him. I suppose I could get them myself.

Q Well, now, what led Dr. Greifinger to make that suggestion to you? A He didn't make any suggestions to me, Mr. Lane.

20 Q Did you ask him? A I asked him to get me the protectors.

Q I thought you said you could have gotten them yourself. A Certainly I could have gotten them, but I asked him to get them, being I got them from him free. I got them from my brother-in-law. I got them from other people.

Q The fact is that after the marriage the sexual intercourse was performed in that way, wasn't it? A That was the only way I ever had intercourse.

30 Q That is what I am talking about. A And that was because I wanted it that way.

Q And that was because you wanted it? A Yes.

Q And not because of the suggestion by Dr. Greifinger communicating the suggestion of Dr. Ornstein, that for some time after this marriage this woman should not have children? A That suggestion never came from Dr. Greifinger, either directly or indirectly. I simply had made up my
40 mind that for the first two or three years of mar-

Gustave L. Goldstein, for Petitioner, cross.

ried life I did not want to have any children; I did not want to be bothered with them or burdened with them.

Q So that it was not from consideration of your wife but because you did not want to be bothered with children, is that right? A I suppose that was probably her own thought in the matter, I don't know. 10

Q I am not asking you about her own thought. A As far as I was concerned I did not want any children for at least two or three years after the marriage.

Q You did not want to be bothered with them? A No, sir; I did not want to.

Q Where did you go on your honeymoon? A Through the Adirondacks.

Q Do you remember there was a suggestion that you should go to Europe? A Do I remember there was a suggestion? 20

Q Yes. A From whom?

Q From anybody. A No, sir; there was never any suggestion.

Q Any talk about your going to Europe? A No, sir.

Q Don't you remember there was talk about your going to Europe on a honeymoon, that you made the suggestion yourself? A We discussed different places where we might go. Europe may have entered the discussion, but I don't think more than casually at the very most, because I was not prepared to take off two or three months to make a trip of that kind. 30

Q Don't you remember that Dr. Greifinger said he did not advise your going to Europe because it would be a strain on your wife in her condition of health? A No, sir. He never had a thing to say about my honeymoon. 40

Gustave L. Goldstein, for Petitioner, cross.

Q It was discussed through other members of the family? A No, sir; I never discussed it with Dr. Greifinger. Very little I ever did discuss with him.

Q Didn't mention it to him? A No, sir; not to him.

10 Q Well, you discussed, when you wanted your own physician and there was objection, I understood you to say that somebody said that Dr. Ornstein was very good. A Ornstein? No, I think you are mistaken, Mr. Lane.

Q What? A I don't recall that.

Q My recollection is that you said—your wife said, rather, that she did not want Dr.—whoever it was. A Fuerstman, but she wanted Dr. Polevski, you mean?

20 Q Yes. And she said Dr. Ornstein was very good. A I said Dr. Ornstein was very good?

Q No. She did to you. A She seemed to think that Dr. Ornstein was—(interrupted.)

Q Did she make that statement during this time that you were trying to get her to have some other physician? A She thought that Dr. Ornstein was good enough.

30 Q At that time she was coughing? A Will you fix the time, Mr. Lane? You mean after Thanksgiving Day or when?

Q When she made this statement. A Yes, she was coughing.

Q When did she start to cough? A She got her first cough, as far as I was able to really detect it, that is, more mildly at first, in the middle of September or thereabouts, the cough was mild. It continued to be mild, that is, of a mild nature, up until the Thanksgiving Day affair that I referred to before.

40 Q Then it got very much worse? A After Thanksgiving Day.

Gustave L. Goldstein, for Petitioner, cross.

Q And she could not keep food on her stomach? A That is right.

Q And she brought up sputum? A That is right.

Q That continued and got worse and worse? A Apparently so.

Q You thought it was a simple cold? A 10
When, in the latter part of that year?

Q In November. A You mean November and December?

Q Yes. A No. About that time I thought she had a very severe illness.

Q Well, what? A Well, I was told she had bronchitis, a very aggravated condition of bronchitis.

Q You never thought of tuberculosis? A
No, sir, it never entered my mind. 20

Q You didn't know from your general experience what the usual symptoms of tuberculosis are? A No, sir; I never knew.

Q Not even where there is a continuous, hacking cough? A No, sir.

Q And a continuous bringing up of sputum? A I knew nothing.

Q You had no idea that was something more than an ordinary cold, ordinary bronchitis? A
I didn't know it, especially in view of the fact
I was told she had this condition. 30

Q And had no suspicion of it? A No suspicion of it.

Q And when she said that Dr. Ornstein was all right, or what not, you never made any inquiry then as to who this Dr. Ornstein was, as to what his specialty was? A She simply told me he was a very good man.

Q You made no inquiry? A No.

Q Here was your wife— A No, I made no
inquiry. 40

Gustave L. Goldstein, for Petitioner, cross.

Q —going into a decline before your very eyes and you made no inquiries? A At that time I was no longer satisfied with Dr. Ornstein under any circumstances, I didn't think it necessary to make any inquiry; I felt she had been sick for several months and apparently too long and I did not care what she said about Dr. Ornstein or how favorably she thought of him.

10 Q Why didn't you find out who he was? A I didn't think it was necessary for me to do so at that time any more.

Q What did she say as to the reason why she did not want your doctor, Dr. Fuerstman, or whatever his name is? A She said she didn't want Dr. Fuerstman because he was in the family, it was none of the family's business how sick she was.

20 Q Didn't she say that because he was a family doctor and was also a general practitioner, family practitioner— A Family doctor,

Q So she did not want your doctor because he was a general practitioner? A That is right.

Q It was obvious, then, to you that her doctor was a specialist. A I don't know; he might have been a very good doctor without being a specialist.

30 Q Didn't she draw the line right there between a general practitioner and a specialist, she didn't want a general practitioner? Now, do you mean to say that that did not indicate to you that Dr. Ornstein was some sort of a specialist? A It may have been an indicator, but it did not fasten itself on my mind or suggest itself.

Q It did not register on you? A No, sir; it did not register.

40 Q Now, when was it that this statement was made that the thing probably started at Brown?

Gustave L. Goldstein, for Petitioner, cross.

A It was around—after the Thanksgiving Day affair, some time during the month of December, or thereabouts.

Q Did you ask them what they meant by that, how many years ago that was ? A I didn't ask, I didn't inquire at the time.

Q Why not? A We were there just talking in a sort of jest and jollity—just a little banter. It did not occur to me at that time. I simply thought that—(interrupted.) 10

Q You have remembered it until this day, and here you had a wife going into a decline before your eyes, and who you were told had nothing but a cold or bronchitis and you were told by the family or by some member of her family, and your mother and sister are told, that the thing started when she was at Brown, which was three years before or more. A Mr. Lane, there are a lot of things that in retrospect have been coming back to my mind that never occurred to me then to question about or inquire about. 20

Q Why didn't you make some inquiries then about this thing starting back some three or four years ago, that it was more than a cold?

A I cannot say, except that I did not.

Q That did not give you any suspicion? A No, sir. 30

Q That there was something more than a simple cold or simple bronchitis? A It did not occur to me at that time. As I said before, we were just talking about in an idea of banter, the spirit of banter.

Q As I understand it, at this conference that you had up at Saranac Lake, or, rather, at Dr. Ornstein's office—which was when? A This last conference I am talking about? 40

Gustave L. Goldstein, for Petitioner, cross.

Q Yes. A That was in the latter part of January, 1929.

Q You asked whether or not your wife had tuberculosis? A Yes, sir.

Q They didn't tell you? A You mean in response to my question?

10 Q No. Before that. A No, sir.

Q Why did you ask them that? A Because there were certain things that happened, and about which you did not permit me to testify before, on objection, that led me towards the latter part of December to feel that my wife possibly had tuberculosis.

Q Well, now, what were they? A Those things were these: Some time, either shortly prior to Polevski's visit to my wife, or afterwards, I went to see Dr. Fuerstman and I asked him—I told him about the nature of my wife's illness, I described the symptoms to him and I told him I wanted him to give me the name of a specialist that I wanted to call for the purpose of making an examination of her, that I was not satisfied with the progress she was making with the physicians under whose care she was at that time. I described the symptoms to him as accurately and as clearly as I could from my observations as a layman. After I got through he told me, "Gus, there is no use of your going to see any specialist," he says, "I can almost tell you, as painful as it is for me to tell you, that your wife has t. b." I said, "Well," I said, "that is rather a sharp sort of a statement to give me and," I said, "something I would not want to go by unless I actually knew it to be the fact by a physician who had actually physically examined her," and I told him to
30
40 give me the name of some specialist, and he

Gustave L. Goldstein, for Petitioner, cross.

gave me the name of two specialists, a Dr. Miller of New York and a Dr. Fishberg of New York. When I came back from that visit, I got hold of her brother and I says, "Marcus, I have been down to see Dr. Fuerstman, he tells me that from what I told him of Reggy's illness that she must have t. b., and he seems to feel that even without examining her he would come to that conclusion." I said, "I want to find out for myself; I am going to call a specialist to examine her," and he says, "Who do you want to get?" I said, "I am not going to tell you who I am going to get. I am going to bring a specialist up to the house to examine her." He ridiculed the idea. "Why," he says, "that—he is crazy," he says, "that man doesn't know what he is talking about." That was the pith and substance of that conversation. 10 20

Q Yes. This took place when? -A I would say some time during the latter part of December, or thereabouts.

Q Well, is that the thing that made you suspicious that your wife had tuberculosis? A That was the first thing that gave me cause to suspect.

Q And did anything else occur from that time until the time you went to Dr. Ornstein's office—(interrupted) A Pardon me. And also, in talking to Dr. Fuerstman, he told me, "Gus, if you will bring me a sample of her sputum, I can examine it and I will be able to tell, with some reasonable degree of accuracy, whether or not she has tuberculosis." I came home and I told her brother I wanted him to get a sample of her sputum. I did not want him to tell Reggy about my visit to Dr. Fuerstman, because I didn't want to scare her, because perhaps she 30 40

Gustave L. Goldstein, for Petitioner, cross.

did not have tuberculosis, perhaps he was wrong in his surmise. He refused to give me a sample of her sputum. Does that answer that question, Mr. Lane?

Q Was there anything else that made you suspicious before you went to Dr. Ornstein? A
10 Those were—practically that and—and I would say that was about all.

Q Those were the things which led you to ask Dr. Ornstein, or say, “Has my wife got tuberculosis?” A Yes, sir, and not only that, it brung to mind this also: at that time Mr. Fuerstman told me, he said, “What I can’t understand from what you told me of that girl is permitting her to remain in the city; that girl should be up in Saranac.”

20 Mr. Lane: If the Court please, I have got Dr. Ornstein over here. He is a New York doctor who must be at a lecture this afternoon at two o’clock which he gives. Now the case, apparently, will not be finished today. I don’t know whether your Honor is going to sit tomorrow or not.

The Court: I will make up my mind. Why do you want Dr. Ornstein?

30 Mr. Lane: I don’t know whether Dr. Ornstein can get back here tomorrow.

Dr. George G. Ornstein: I don’t think I can possibly be here tomorrow. You see, I have arranged my program. I will be operating practically most of the morning and then I have lectures to give, which I cannot be excused from.

40 The Court: I don’t suppose you want to put the doctor on now—half an hour.

Gustave L. Goldstein, for Petitioner, cross.

Mr. Lane: I'd rather not. It is too short a time.

The Court: Because he apparently is going to be a very important witness.

Mr. Lane: Mr. Unger said, if we could not reach him today, that we cannot get him back here before your Honor, we will take his testimony *de bene esse*. 10

The Court: I think we can arrange another date when he can come, because I want to hear him. I think Dr. Ornstein's statement is very important and I want to have him before me.

Dr. George G. Ornstein: It may be possible that I could have someone cover me this afternoon. Would it be possible to have my evidence taken this afternoon? 20

Mr. Lane: I would rather not, doctor. I will say to you in open court I would rather not, because I would like to know everything that is going to be said on the other side before I put you on. That is the trouble. If we put you on there may be something said at some future time in their case that would make it necessary for you to come back again. 30

Dr. George G. Ornstein: You see, my work is so arranged that I have this big institution to handle and I have a very big private practice to take care of, so it will be impossible for me to do that.

The Court: We can excuse you for today.

Dr. George G. Ornstein: I mean, it is going to be awfully awkward.

The Court: We will give you plenty of time. We will set the case far enough in 40

Gustave L. Goldstein, for Petitioner, cross.

advance so that you can make your arrangement.

Mr. Lane: I do not want to discommode you, doctor, but I would like to have you after the whole of the petitioner's case is in.

10 Dr. George G. Ornstein: It is going to be very awkward for me. If the Court will need me, I will have to come; it seems I have to.

The Court: We will try, doctor, to give you plenty of notice.

20 Dr. George G. Ornstein: You see, I am not talking for my own personal things. I have certain duties in positions where there is no substitution for me and they must go on. There is no way of getting out of them unless you give me plenty of time.

30 Mr. Unger: I will say this; outside of the testimony of this witness, I intend to have read the depositions which are known to the other side, the depositions we took of the physicians at Saranac Lake, and to examine only one physician, who is here in court, and who will not, as far as I know, testify to anything in which the name of Dr. Ornstein comes in question.

Mr. Lane: If that is so, then if Dr. Ornstein can arrange to stay here this afternoon, we may be able to get rid of him.

Dr. George G. Ornstein: I will go ahead and phone to the college and rearrange things.

Q Did you ever ask your wife for money? A No, sir.

40 Q You knew she had money? A I knew she had money, yes.

Gustave L. Goldstein, for Petitioner, cross.

Q Do you remember losing a considerable amount of money on the New York stock market?

A Never had any stock on the exchange.

Q I didn't ask you that. There are other markets than the exchange. A I have—(interrupted).

Q What? A You mean, you are referring now to any trading— 10

Q Yes. A —or market trading? Oh, I can't say that I have lost money in it. I have got a lot of local securities which have depreciated in value.

Q Do you remember that in the summer of 1928 you either lost or thought you lost a large sum of money and that you asked your wife to permit you to take her money— A No, sir; I never asked— 20

Q —when she was ill, and that she declined and said she was ill and that she had to protect herself. A Absolutely not, Mr. Lane. In the first place, I never lost a lot of money in stock, and, in the second place, I never asked her for a dime and I never got a dime.

Q Did you ask her to permit you to invest her money? A No, sir; I never asked her—to permit me to invest her money? 30

Q Yes. A No, sir. I never did.

Q Did you invest her money? A No, sir.

Q Was there any discussion about that? A She said that she wanted to make some investment, but I did not request her to permit me to invest her money. I never made an investment for her.

Q The matter of your investing her money was discussed, was it not? A That I invest her money? She wanted—(interrupted) 40

Gustave L. Goldstein, for Petitioner, cross.

Q The matter of investing her money, not that you did not, but the matter that you were going to, or something of that kind, was discussed, wasn't it? A The question of my investing her money was never done. She wanted to invest some money, she wanted to buy some shares of stock, and she did buy some stock.

10 Q Who paid her expenses? A For what?

Q At Saranac? A I paid for the first month that she was up there.

Q How much? A Why, during that month, I gave her approximately—that is, before she left there and what I gave her during the month, approximately five hundred dollars.

Q And that was the month of what? A I would say, the month of February, 1929.

20 Q Who paid the expenses at Lakewood? A I did, although she paid for it by her check.

Q Well, what do you mean? A She had a checking account—I would give her—she had her own bank account. I would give her money from time to time which she would deposit in her own account and check out of it. That is, it was done in that case. If I had been down at Lakewood when she departed, that is, left Lakewood, very likely I would have paid things with my own fund, with money I had with me.

30 Q Did she ever draw checks to your order? A She drew some checks, yes.

Q To your order? A Yes, sir.

Q Why? A Why, there was one occasion, I think, when she was up at Saranac she drew one check to my order for, I think, seventy or eighty dollars, or so. I told her I wanted to keep a very careful check of her expenses in connection with her stay at Saranac.

40

Gustave L. Goldstein, for Petitioner, cross.

Q Yes? A And I told her that I wanted to draw a check for my own expenses for going up there and coming back and hotel bills, and so forth.

Q Well, I show you a check dated February 7, 1929, by Mrs. Goldstein to your order and ask you what that was for. A I just explained that transaction now. 10

Q Well, what is it? I did not understand it. A It was supposed to be an amount practically equalling the amount which I had expended in going back and forth in connection with that trip to Saranac, fares I had, expenses I had.

Q Why did she pay your bill? A I just wanted to keep track of how the expenses would go and I simply worked that plan out. There was nothing in it. 20

Q I cannot understand the reason for it now. A Well, that is my reason. It may seem queer, but that was my reason.

The Court: I cannot exactly understand it. Did this money come out of your wife's account?

The Witness: Are you asking me that question, your Honor? 30

The Court: Yes.

The Witness: It was a check drawn from her account from funds I had given her.

Q Are you sure it was funds you had given her? A Absolutely.

Q Then why did she pay it out of her account for you, to reimburse you for going up there to her? A I just wanted to keep that item straight, that is all. 40

Gustave L. Goldstein, for Petitioner, cross.

Q It seems to me the item would have been kept straight if you had told us or given us how much she was to spend, that would end it, but why would you get a check from her to reimburse you? A It was an idea that occurred to me at the time. That is why I did it.

10 Q What was the basis of the idea? A Just I wanted to keep track of it.

Q How does that keep track of it? A I consider this an expense incurred during her illness and this expenditure I consider to be the same as any other moneys which she might have disbursed to somebody else as an expenditure in connection with her illness.

20 Mr. Lane: I ask that be marked for identification.

(Check marked D. 1 for identification.)

Q Did you get this check at Saranac? A I think I did, yes.

Q On what visit? A That was on the first visit.

Q Not the visit after the suit was started?
A No.

30 The Court: When was it? What was the date of the check?

Mr. Lane: The check is February 7, 1929.

The Court: The petition was filed March 21st.

Q After you got this check of February 7, 1929, did you send your wife any other money?
A I don't know, I think there is. I got some checks in that folder over there, in that folder,
40 Mr. Unger.

Gustave L. Goldstein, for Petitioner, re-direct.

Mr. Unger: Here?

The Witness: Yes. I think I have. I can tell from that. I sent her one hundred fifty dollars on February 19, 1929.

Q Yes. And was that the last? A I think that is the last. 10

Mr. Lane: I think that is all.

The Court: Is there any re-direct?

Mr. Unger: Just one question.

Re-direct examination by Mr. Unger.

Q Mr. Goldstein, you were asked if you took home the bag of Dr. Greifinger and you answered "Yes." Will you tell us under what circumstances? 20

The Court: No. He took the witness' bag home.

Mr. Unger: I am wrong.

The Court: He asked the doctor to take the bag home.

Q You were asked if you requested Dr. Greifinger to take your bag home and you answered "Yes." A It was my suitcase and he had his apparel in my suitcase. When we got to Newark, I was staying at the home of my folks at that time and he was at my wife's home, I told him to take the suit case home so that he could take out his belongings, then have him deliver the suitcase to my house with my belongings. 30

Mr. Unger: All right; that is all. Is Dr. Gluckman here? 40

I. Edward Gluckman, for Petitioner, direct.

I. EDWARD GLUCKMAN, sworn for petitioner.

Direct examination by Mr. Unger.

Q Doctor, you are a practicing physician in this county? A I am.

10 Q And your office is where? A 31 Lincoln Park, Medical Tower.

Q And you have been practicing for how long? A Twenty-four years.

Q And during that time have you specialized in any particular branch? A Pulmonary diseases and tuberculosis.

Q You specialized in those branches during all that time? A Since the end of 1906.

Q Are you connected with any sanatoriums? A President of the Board of Managers of the
20 Essex County Sanatorium.

Q At Verona? A At Verona.

Q And were you ever connected with the State Sanatorium at Glen Gardner? A Former vice-president of the Board of Managers of Glen Gardner, State Sanatorium.

Q And were you ever connected with the Newark Sanatorium in Verona? A I was superintendent from 1906 to 1909.

30 Q Do you hold any medical position with the school system in Newark?

The Court: I think Mr. Lane will admit this witness' qualifications.

Mr. Lane: I think so. I think he is qualified now.

Mr. Unger: I think I have one more. What was the last question?

40 (Last question read as follows: "Do you hold any medical position with the school system in Newark?")

I. Edward Gluckman, for Petitioner, direct.

A Supervisor of tuberculosis in the public schools in Newark.

Q Now, doctor, what kind of a disease is tuberculosis? A Chronic, recurring disease of long standing.

Q Is it an infectious disease? A Both infectious and contagious. 10

Q And can this disease be transmitted to offspring? A The consensus of opinion is that it is transmitted mainly through children.

The Court: What do you mean by that?

The Witness: The infection—the child inhales the germ and is more susceptible than the adult because—(interrupted).

The Court: What Mr. Unger wants to know is could a consumptive have healthy progeny? 20

The Witness: Oh, yes, immediately after birth the child is healthy.

Q If either parent is afflicted with tuberculosis, is it or is it not likely that the children will be predisposed to the same disease? A As to the predisposition, I do not believe that there is any more predisposition of that child than any other child, but the chances of infection are more likely with a parent having tuberculosis than one that hasn't got it, due to infection. 30

Q Now, is this a germ disease? A Yes, sir.

Q And is it or is it not contagious? A It is considered both infectious and contagious.

Q Now, where does it flourish, on the inside or on the outside? A Mainly on the inside.

Q Now, in what manner may it be contracted on the inside of the home? A Through inhaling germs. 40

I. Edward Gluckman, for Petitioner, direct.

Q Does this disease have different stages? A Yes, sir.

Q And what are they? A You have your incipient or minimal stage, your moderately advanced or middle stage, and your advanced, far advanced.

10 Q And is this a disease which, in your opinion, it is possible to cure? A It depends upon the stage you get the case in.

Q Well, won't you tell us the stages—won't you describe to us the different stages? You told us there were three of them? A Well, the minimal stage means a slight deposit of tubercular deposit in the lung.

The Court: That can be cured?

20 The Witness: That can be cured. Your moderately advanced condition is a condition where it has spread and probably involves almost an entire portion of the lobe. Your advanced stage—(interrupted).

The Court: Well, can that be cured?

The Witness: That can be arrested.

30 Q Won't you pause there and tell us what you mean by an "arrest"? A An arrest means that all your active symptoms have disappeared for a period of time, usually years.

Q Yes. A With no recurrence.

Q And in that situation it may be said the disease has been arrested? A Yes, sir.

Q But not cured? A No, sir.

40 Q How long a period, in your opinion, must elapse before it can be definitely said that the disease has been arrested? A Well, if a patient goes along for a year without having any active symptoms—or two or three years—it depends

I. Edward Gluckman, for Petitioner, direct.

upon the type of case and it depends on the case before you can make a definite statement as to that, but, as a rule, we figure if a case goes along for a period of a year or two without any active symptoms, that case is arrested.

Q And then it may, under certain circumstances break out or relapse? A It may recur at any time. 10

Q "Recur" is a better word. And this is known to all physicians, is it? A Yes, sir.

Q Or should be known to all physicians? A Yes.

Q Now, did you examine Mrs. Goldstein, the defendant in this case? A Yes, sir; on September the 7th.

Q Of this year? A Yes, sir.

Q And where was the examination made? A In her home. 20

Q Was that by arrangement with you? A Well, my original arrangement was to come to my office.

Q Were you obliged to go there? A I was obliged to go there to examine her.

Q Prior to the examination, did she give you any history of her sickness? A I requested a history and they refused to give it to me.

Q Yes. And after that did you make your own examination? A Yes, sir. 30

Q And will you tell us of what this examination consisted? A An examination of the lungs by stethoscope and percussion, hearing at the chest, listening to the chest.

Q And from that examination did you find anything to be the matter with the part which you examined? A Yes, sir. I found that this woman had tuberculosis.

Q And, based upon that examination, for how long a period of time would you say that it had 40

I. Edward Gluckman, for Petitioner, direct.

existed? A Well, this was a—from the examination of that chest the condition of the chest appeared to me to be a case that had been there for years.

Q Won't you tell us in detail just what you found to be the matter with the different portions that you examined?

The Court: Which kind of a case was this? Was that explained?

Mr. Unger: I have been coming to it.

The Court: I should not have interrupted.

Mr. Unger: Your Honor, I don't mind the interruption, if your Honor wants to ask it, I have no objection.

The Court: I should not interrupt.

The Witness: I found this woman was raleing on the left side to about the fifth rib, with evidences of bronchial, sickly breathing; a slight evidence what appeared to me like cavernous breathing between the second and third rib; she had numerous coarse rales on that side. Taking all of these things into consideration, I would have called this condition an inactive condition of the lung that had been there for a long time.

The right lung showed some fine rales with a slight impairment of note at the apex to about the second or third rib. These fine rales indicated to me that this woman had, at this time when I examined her, evidences of a slight activity. The whole case as a whole, examining both lungs, would appear to me as a moderately advanced case of tuberculosis.

I. Edward Gluckman, for Petitioner, direct.

Q Yes? A She also showed evidences of a little pleurisy at the base of the left lung.

Q Now, when you say "pleurisy at the base of the left lung," just what do you mean by that? A That is a little irritation to the outside, irritation to the covering of the lung.

Q From the examination that you made at that time, did you form an opinion as to how long the condition which you then found had been in existence? A I figured that the condition had been there for five or six years at least. 10

Q And what was its condition at that particular time? What was its stage then? A Well, the left lung, as I said, was quiescent, it appeared to me. The right lung appeared to be slightly active. 20

Q What do you mean by "quiescent"? A There were no active symptoms.

The Court: You mean that the—

The Witness: The type of—(interrupted).

The Court: The disease was not progressing in the left lung?

The Witness: On the left lung.

The Court: But it was slightly progressing on the right lung? 30

The Witness: Yes, sir; that is the way it appeared to me.

Q Now, then, did you observe any signs of this disease between the second and third rib? A Well, there was a different breathing sound between the second and third rib, more of a cavernous breathing which led me to think there might have been a little cavity there. I could 40

I. Edward Gluckman, for Petitioner, cross.

not definitely say that, because, unless the cavity is large enough, you cannot, as a rule, definitely make a diagnosis of a cavity, but you can see it. If I had had my fluoroscope there and had X-rayed her, I would have known immediately.

10 Q You were unable to take the fluoroscope?
A She wouldn't—didn't come to my office and I couldn't do it.

Q There was none in the office in which you did examine her? A I didn't see any.

Q And none was offered to you? A No.

Mr. Unger: That is all.

The Court: Do you want to cross examine now?

20 Mr. Lane: Well, only about one or two questions, if the Court please.

Cross examination by Mr. Lane.

Q Doctor, how long did you take on this examination? A About a half an hour.

Q You made no examination except with a stethoscope? A That is all.

30 Q The same symptoms that you found could be caused by other conditions, couldn't they? A What do you mean by "symptoms"? You mean the—

Q The change in note. A The change in note?

Q Yes. A Not the exact type of rale or the exact type of notes, you wouldn't get in any other condition, but a tubercular condition.

40 Q You are willing to say that you can diagnose a case of arrested tuberculosis positively by the use of the stethoscope only? A I have

I. Edward Gluckman, for Petitioner, cross.

felt as though I could do it. I have tried to do it.

Q You not only can do it, but—

Mr. Unger: Pardon me. Had you finished your answer?

(Witness nods yes.)

10

Q You not only can do it, but you can also determine the length of time that the condition has been present? A I can approximate the length of time, yes.

Q And you didn't know, of course, when this woman was supposed to have been first suffering from tuberculosis? A No, sir; I knew nothing regarding the case.

Q You were not informed of it— A No, sir.

20

Q You were not informed of it by anybody? A No, sir, not when she was first sick.

Q It may be four years or it may be six years? A That is, as I said, it may have been a length of time around four or five, six, seven years. I can't tell exactly, but you can tell approximately that this condition had existed for some length of time.

30

Q You have said five or six years, as I understood? A That is right.

Q You were informed, it is conceded, that she suffered from tuberculosis in June, 1923, which would be six years. That had no influence on your diagnosis? A After my examination, her brother walked out to the door with me and he said, "We concede that this woman had tuberculosis before." That is all I know about it. That is the only information I got about it.

40

I. Edward Gluckman, for Petitioner, cross.

Q Did you call it an arrested case? A Yes. Outside of this acute lung exacerbation she had on the right side.

Q Now, this acute condition you indicate in the right lung, would you say that is due to tuberculosis? A Yes, I believe that is tuberculosis.

10 Q What? A Yes, I believe that is an inflammation—

Q Do you know it is an inflammation due to a tubercular condition? A I believe so.

Q What do you base it on, the mere fact there is this irritation, the fact that there is a tubercular condition? A Certainly.

Q You can find exactly the same thing in an ordinary person's lungs who is not suffering from tuberculosis, can't you? A No, sir.

20 Q Nothing else would cause that irritation that you now find in this lung except tuberculosis? A Not the exact type of rale that you would get and the sound that you would get.

Q Now, tuberculosis, as I understand your testimony to be is this, with respect to heredity and all that sort of thing, that neither the disease itself nor a tendency or a predisposition to the disease is transmitted to the offspring by the act of birth? A No, sir.

30 Q And whatever contagion or infection occurs after is merely because the father or mother, as the case may be, has tuberculosis, and, under ordinary circumstances, would be in contact with the children? A That is my opinion.

Mr. Lane: That is all.

Q All doctors do not concur with you on that? A Eh?

40

I. Edward Gluckman, for Petitioner, cross.

Q All doctors do not concur with you on that? A I think the majority of them do.

The Court: We will adjourn.

Mr. Unger: I have depositions to read.

The Court: Are you familiar with the depositions, Mr. Lane? 10

Mr. Lane: Yes.

The Court: I will read them and assume they have been read.

Mr. Unger: Of course, I am—(interrupted).

The Court: I am anxious to get the doctor on.

Mr. Unger: Yes, sir, I am willing to defer the reading of them, the offer, until Mr. Lane gets through with them. 20

Mr. Lane: Then are you through?

The Court: No, he has another witness.

Mr. Unger: No. With the exception of the depositions I am through.

The Court: Very well, then, put your doctor on.

Mr. Lane: I would like to call the doctor so as to get rid of him, although I do at this stage of the case direct your Honor's attention to fact that, so far as I have been able to observe either from testimony here or depositions, there is no corroboration at all of deception or fraud proved. 30

The Court: Of course, you know the Chancery rule, if you want to make a motion you are precluded from any other testimony.

Mr. Lane: I know that and therefore I do not make the motion, if the Court please. 40

George G. Ornstein, for Defendant, direct.

GEORGE G. ORNSTEIN, sworn for defendant.

Direct examination by Mr. Lane.

Q Where do you live? A I live in New York City, my residence.

10 Q And what is your profession? A I am a physician, sir.

Q How long have you been a physician? A I graduated from New York University and Bellevue Medical College in 1915.

Q And do you confine yourself to any particular subject? A I do pulmonary tuberculosis as a specialty .

Q How long have you been confining yourself to that specialty? A Since after the war, 1919
20 I started.

Q And what positions—what are you doing at the present time and what positions did you occupy? Tell us, generally, your qualifications. A I am director of the tubercular service at the Metropolitan Hospital, New York City; I am a visiting physician to the Municipal Sanatorium at Otisville, New York; I am an associate professor of medicine, teaching that subject at the new Homeopathic and Flower Medical College;
30 I am an associate of medicine of the Post Graduate Medical School; and I am an associate of medicine at the College of Physicians and Surgeons at the Columbia University.

The Court: Is that sufficient, Mr. Unger?

Mr. Unger: Yes, sir.

The Court: Qualifications admitted.

Q Doctor, you know Mrs. Goldstein? A
40 Yes, sir.

George G. Ornstein, for Defendant, direct.

Q When did you first come in contact with her in a professional way? A In 1923 when I was summoned to Newark to examine her.

Q And did you examine her? A Yes, sir.

Q And what did you find as the result of that examination? A She had a tuberculous infiltration in her left lung that was active and in our classification it was a caveous penumonic type. 10

Q And what did you do? What did you advise? A We kept her in bed until she got over the acute stages of it and then sent her up to Saranac Lake under the care of Dr. Mayer, where a pneumo-thorax was produced to collapse that lung.

Q How long did she remain there? A She came back to me in 1925.

Q What then? A And I continued her pneumo-thorax treatment; at that particular time, I maintained the pneumo-thorax treatment; we had to put air into the pleural space to keep the lung compressed. 20

Q And what was her condition at that time? A She was very much improved constitutionally; she was free of coughing and expectoration; she had gained considerably in weight, and because of the appearance of some fluid I thought it would be best to allow her lung to re-expand, because I thought it best for whatever curing had already taken place, and we allowed her lung to re-expand. In the expansion of her lung, due to the thickness of her pleura, an adhesion was formed between the pleural lining of the thoracic cavity and the lung, which pulled the heart and mediastinal structure into the left thorax, pulling the trachea way into the left thorax. 30

Q What was the condition then with respect to the tuberculosis condition? A We assumed that a tuberculous condition was arrested. 40

George G. Ornstein, for Defendant, direct.

The Court: What was the answer?

(Answer read as follows: "We assumed that a tuberculous condition was arrested.")

The Witness: We determined that a tuberculous condition was arrested.

10 Q What do you mean by "arrested", doctor?

A I am quoting a classification that has been adopted by the National Tuberculosis Association; an arrested case is a case that is free from constitutional symptoms. That means symptoms, meaning the complaint of the patient, there is no temperature or increase in pulse, where there is no increase in temperature, there is no fatigue, the patient has been gaining weight, the patient is able to move around like an ordinary individual can, and at the same time, the signs of the thorax, the physical findings that are listed on examining the patient with a stethoscope, suggests a healed case, which is also confirmed by an X-ray examination.

20

Q When did you next see her? A Pardon me. The sputum, too, should be negative for six months.

30 Q When did you next see her? A I suggested to her, like I do with all patients that have reached that stage, that they come in periodically, for periodical health examination, for a check up to make sure there is no further extension of the disease, and she came to my office at various periods from then up until the time I again visited her in February, 1928.

Q Now, then, at these different periodical examinations, about how many were there between that date? A May I look at my notes?

40 Q Yes. A Well, there may have been between October 25th, when I stopped the pneumo-

George G. Ornstein, for Defendant, direct.

thorax—we followed her very carefully for about six months, then I would probably see her on an average of once every six months, twice a year.

Q And what did you find her condition to be at the different periodical examinations? A I found her tuberculous condition arrested. At one time she had some symptoms of pollenalogy, hay fever. 10

The Court: You better spell that, doctor.

The Witness: P-o-l-l-e-n-a-l-o-g-y, or hay fever.

Q Was the next time you saw her when you saw her in February, 1928? A 1928. February, 1928, I saw her at her home.

Q How did you come to see her at her home? A Her brother asked me if I would visit her, that she had some temperature and they were alarmed about her condition. 20

Q And did you examine her, go to her home and examine her? A I did, sir.

Q And what condition did you find? A I found an acute upper respiratory infection, what I would call an acute tracheal bronchitis. Of course, she still had signs of her old healed tuberculous process.

Q Who was present at your examination? Who were present? A Dr. Greifinger was with me while I examined the patient. 30

Q Do you know Mr. Goldstein? A Yes, I do know him. I met him there for the first time.

Q And did you have a conversation with him at that time? A When I came—after I—no, when I came to the patient, she told me that she was engaged to be married and I examined her and I asked her if she had informed her fiance—(interrupted). 40

George G. Ornstein, for Defendant, direct.

Mr. Unger: Objected to.

The Court: Yes. Was he present?

The Witness: At the examination?

The Court: No. When she informed you of that.

10 Mr. Lane: No, he was not.

The Witness: No; that was in the presence of Mr. Greifinger.

The Court: I will sustain the objection.

Q Just get to the—(interrupted) A Well, after—knowing that she had been engaged and having asked the patient whether she had informed her fiancé—

Mr. Unger: No.

20 The Court: No, don't say that.

The Witness: I am sorry. I am trying to tell my story. I don't know how to say it.

Q Just get down to the conversation you had with Goldstein. A Oh. Well, I went down to see—when I came down, I told Mr. Goldstein that there was nothing to worry about her pulmonary condition; in fact, I tried to explain to him by making a drawing of what had previously happened. I took out one of my prescription pads and sketched what had taken place. I explained—of course, the details of which I just can't remember exactly, or the exact words that I used, but I made very plainly a diagram showing the chronic form of tuberculosis, the collapse of the lung, the fluid, how the lung was pulled over and how it distorted the trachea and the bronchia into the left thorax.

30

40 The Court: How do you spell "trachea"?

George G. Ornstein, for Defendant, direct.

The Witness: T-r-a-c-h-e-a, —distorted into the left thorax, and how simple and easy it was for the retention of secretion to occur there, and an acute cold might cause a flare-up, that we call an acute tracheal bronchitis, and the possibility of these attacks occurring were very frequent in such conditions, but they would not amount to anything at all. 10

Q Was anyone present at this talk? A Dr. Greifinger was with the two of us. I can remember—I can almost remember the room. He came downstairs and it was on the left side of the room, he was standing there. I first congratulated him and told him he was to marry a very sweet, lovely girl and that I had known her for a long time as a patient, that I—of course, my explanation was to him that he knew what was happening, that I wanted to assure him, being a fiance, that there was no worry about a tuberculous conditoin, that this was just a cold and would blow over and she would get well. 20

The Court: You informed him in the course of this conversation that the lady had had a tubercular condition?

The Witness: Yes. I made a diagram of the whole thing, sir. 30

The Court: Oh, well.

The Witness: And showed him just how the mechanical irregularity occurred. In fact, he just said—he pushed the thing away, as though there were no need to do a thing like that. Of course, as professional people we generally do not go into the explanation of things to everybody that is in the room, but that particular time I especially felt he 40

George G. Ornstein, for Defendant, direct.

should know, I mean, because I thought he was terribly alarmed about her condition, not knowing she had the tuberculous—knowing she had a tuberculous condition, I was sort of sympathetic so he wouldn't feel bad about the thing.

10 Q Now, when did you next see her? A I saw her again on June 4, 1928. She came to my office right before her marriage and asked me if she thought—if I thought she could get married, and I thought she could and I told her to go right ahead.

Q Did you examine her at that time? A Yes; I X-rayed her and fluoroscoped her, and she had an arrested tuberculous process then.

20 Q When did you next see her? A I saw her again on October 18, 1928.

Q Where? A That I don't know. I don't remember whether that was—I think that was at my office.

30 Q Do you remember the circumstances? A I think she had again—she had an acute tracheal bronchitis again and she was very—and she was very nervous and very much alarmed about something. I thought she was having at that time some sort of—well, I wouldn't say domestic troubles, but she was unnaturally alarmed about something, but I could not gain her confidence. She said everything was fine. As far as I was concerned, she would not tell me anything. I thought at that time she might have just got an acute inflammation again. She came back to my office, I believe, on November 12, 1928.

Q Let us confine ourselves to this October visit for a moment? A Yes.

40 Q Yes.— This nervous condition that you found, how did that exhibit itself? A Well, she

George G. Ornstein, for Defendant, direct.

was sort of trembling and nervous and it appeared to me as though she was going to say something to me and confide in me, and then would not. You see, I have known this patient since 1923 and we get to—I had the confidence of this young girl up until her marriage. I mean, there wasn't any social activities, work or domestic relations at home, or what not, that she did not confide in me. 10

Q Was there anything in her physical condition or any disease that she was suffering from which would account for the nervousness that you noticed? A No. At that time she just had an acute tracheal bronchitis on top of an old arrested tuberculosis.

Q When did you see her next? A I saw her on November 12, 1928. 20

Q Where? A I believe it was at my office.

Q And can you tell me what the circumstance of that was? A Well, she came in again with the same condition, this persistent tracheal bronchitis that she had, and very nervous and very upset, losing weight. She had very little temperature area then, and she was losing weight and she had a lack of appetite and felt fatigued, but her physical examination, her X-ray examination showed no changes in her previous pulmonary condition. 30

Q Could this—in your opinion, you made at the time, was the nervousness that you saw or observed and the condition that you observed attributable to tuberculosis or any other disease, physical disease that she was suffering from? A No. I could not account for it in that way. I had an idea she had some mental distress then. I mean, that was my thought. I felt as though she was terribly upset about something. 40

George G. Ornstein, for Defendant, direct.

Q When did you see her next? A December 1, 1928.

Q Where and under what conditions? A Well, I think I saw her again at my office, I am not sure. My secretary just jotted down the dates. I saw her again, she didn't say.

10 Q And what was the condition then? A The condition was practically the same thing, a very nervous, irritable girl with the signs of a tracheal bronchitis on top of an old, healed tuberculous process. In fact, in the course of these examinations, I suggested that she be separated away from home and family, because I had an idea there was something irritating her and I suggested she go to Lakewood, or some other nearby place, so she would be separated away from
20 everybody.

Q Did you know whether she followed out these suggestions and went to Lakewood? A I think she went for a week, and, against my wishes, came back.

Q Now when did you next see her? A I have the date December 19, 1928, I saw her at my office with the same trend of symptoms and the same findings.

30 Q And next? A Then I saw her at her home in January, I haven't got the date of that thing. That time she was acutely sick. She had a patch, consolidation that looked like a pneumonic process at her left base, she was dopey, sick, and I thought she had a non-specific pneumonia there. By "non-specific" I mean I did not think it was of a tuberculous etiology. I thought it was again due to—(interrupted).

40 The Court: What was this, doctor? You had better spell it.

George G. Ornstein, for Defendant, direct.

The Witness: "Non-specific e-t-i-o-l-o-g-y."
I thought it was again due to a retention of secretions due to the peculiar changes in the bronchia in the left lung, with a retention of many organisms or whatever organisms might be in that area, fibrous bacillus or pneumococcus. I mean, I am just mentioning those organisms; I mean there was no other—let me put it this way, that is to say, organisms that are frequently found in the upper respiratory tract and I told the family at that time that I thought she ought to get away from there, and I suggested Saranac Lake. I suggested Saranac Lake because I thought she would be separated and we could put her in a nursing cottage and she would be away from all influences; even at that particular time I had no suspicion of any disturbance in her domestic relations with her husband.

Q When did you next see her, doctor? A I saw her at my office on September 25, 1929.

Q Now, in the interim, before this September episode, did you see Mr. Goldstein? A Yes, sir; he was at my office at one of these examinations and he came into the fluoroscopic room with us and I went through the same explanation of things again to him right on the site, because in a fluoroscopic room you can actually visualize the things, you don't have to make drawings, but then I brought him back into my consulting room and I again sketched what was happening there, I mean, I went through the same things all over again with him that I had before they were married and I was astounded to hear him say, while I was in here listening to his—(interrupted).

George G. Ornstein, for Defendant, direct.

The Court: Oh, no, no.

The Witness: Oh, I am sorry.

Q Did he at that time say words to the effect or ask you in words to the effect, "Now, tell me, is my wife suffering from tuberculosis?"
10 A He did not ask me and he was very meek and quiet and seemed to be perfectly satisfied with the examination. There was no question—(interrupted).

The Court: Did he ask you?

The Witness: No, sir; he asked me no questions whatsoever.

The Court: All right.

20 The Witness: Sent me a gift for Christmas.

Q Will you explain, for the purpose of the record, what this fluoroscopic examination is? A It is an examination of the—we use an X-ray tube with a fluorescent screen in a dark room. The image is thrown on the screen so we can actually visualize the lungs through this screen. We use it more for the motion that we cannot
30 see in our X-rays. When they breathe the diaphragm moves down, we can see the air getting into the lungs by the way they aerate and the shadows become less dense. It is an important examination as a check-up with your X-ray. I mean, of course, in a picture you cannot tell whether the diaphragm moves or not, whereas you can see the motion on your fluorescent screen.

Q And what was the condition that you found
40 at that examination? A At that time there was

George G. Ornstein, for Defendant, direct.

no change at all in her lungs that indicated any changes in her pulmonary tuberculosis.

Q How had the old pulmonary tuberculosis affected the lungs? A Well, she had a peculiar reaction. She had a marked thickening of the pleura that pulled her heart and mediastinum and trachea and bronchia into the thorax so that when you looked at the X-ray—I mean, one who is not familiar with the interpretation of films would think there might be a lot of tuberculosis, but underneath that thickened pleura there was good, healthy lung tissue, in my opinion; it looked bad, but it is not; and there were no signs of any cavity formation at all. 10

Q In either lung? A In either lung. She has a very good right lung. I examined her on September 25, 1929, and X-rayed her. The right lung is perfectly normal, always has been normal. 20

Q Now, we will come to the examination of September 29th. What was that examination; what condition did you find her in? A She came back from Saranac Lake; she had gained a considerable amount of weight; she was symptom free; her temperature had subsided. The physical examination disclosed a thickened pleura throughout the whole left thorax, with heart and mediastinum pulled into the thorax. 30

Q And the condition of the left lung? A That was the left lung I just mentioned. The condition of the right lung, do you mean, sir?

Q I mean the right lung. A Was perfectly normal.

Q And what method of examination did you use? A I used the stethoscope, the fluoroscope and the X-ray.

Q Can an accurate diagnosis be made as to whether an active condition found in the lung, 40

George G. Ornstein, for Defendant, cross.

tuberculosis is present by the use of the stethoscope only? A No, sir; the clinical diagnoses are made by the complaints of the patient. I mean, if the patient has sounds in the chest it does not mean that it is active. They may—as long as their temperature is normal, pulse rate
 10 is normal, they feel good, they eat well, they can carry out their day's work, we call that an inactive subject. In fact, our big problem now in teaching is to make the physician recognize that it is not so much the sounds in the chest as it is the symptoms that the patient complains of that determines activity. In fact, our classification of whether a condition is quiescent or arrested depends chiefly on the symptomology, the complaints of the patient.

20 Q In the statement that you made to her with respect to her condition, which you have testified to, and the other opinions which you have expressed, were those opinions and are those your actual opinions with respect to the condition? A Yes, sir.

Q And are they such opinions as you are constantly in your practice being obliged to give? A Absolutely.

30 Mr. Lane: You may cross examine.

Cross examination by Mr. Unger.

Q How long have you known Mrs. Goldstein?
 A Since 1923, sir.

Q Did you know her before that time? A No, sir; she was referred to me through a Dr. Altman, who is a—I don't know what his official position is over at the Newark City Hospital.

40 Q Do you know her brother, Dr. Greifinger?
 A Dr. Altman sent Dr. Greifinger over to me.

George G. Ornstein, for Defendant, cross.

He was a medical student then. I had never met the man. In fact, I—(interrupted).

Q You knew him prior to 1923? A Dr. Greifinger?

Q Yes. A Never.

Q Your acquaintance with him commenced at the same time as your acquaintance with his sister? A The same day, sir. 10

Q Since that time you have been on terms of intimacy with him? A Well, no more than I would with any other physician. I mean—

Q Visit back and forth? A Oh, no, sir; I have never been to his house except on business.

Q No social relations between you at all? A No, sir. He has been to my clinics where he has attempted to have some training in pulmonary diseases, but that is an open invitation to any physician. 20

Q I understand you to say that Mrs. Goldstein had your confidence? A Yes, sir; as I testified.

Q As you testified. Up to the time of her marriage? A Yes, sir.

Q And was there a change after that in the degree of confidence that you used to enjoy? A She used to tell me what her people would want her to do and what her future career should be, and things of that sort. 30

Q That is what I mean, whether or not you noticed any change in her confidence in you so far as her parents was concerned? A Oh, no, it was just—in fact, I was responsible for anything she did from 1925 up until the time she was engaged.

Q Yes? A I mean, I planned out her life and allowed her to get back into her work, and things of that sort. 40

George G. Ornstein, for Defendant, cross.

Q Well, you refer to the time when she went to college, Brown University? A No, I didn't know her then. I knew her after she came back from Brown.

10 Q Well, what work do you refer to that she did? A Well, when she—after she got well, I had gradually allowed her to get back into work, for example, she was syndicating, she was writing at that time, and she was doing a lot of research work in the libraries and I would tell her how much she could do, what she could not do. Of course, we try to make them be cautious for a while after we stop their pneumo-thorax treatment. I wanted to make sure she did not do too much.

20 Q Yes, I understand. Now, your examination was first made in 1923? A Yes, sir.

Q And did you at that time take X-ray pictures of her? A I didn't, sir.

Q You did or did not? A I did not, because she was sent away, she was sent from her home to Saranac Lake.

Q Yes. And you did not examine any that were made of her at that time? A That I couldn't answer. Maybe there might have been an X-ray that had been taken at a local laboratory here. I don't remember.

30 Q Have you any recollection— A No, I have not any recollection.

Q —at this time of having examined X-ray pictures of her at that time? A I don't remember.

Q And I understand you to say that you were summoned to Newark to examine her? A Yes, sir.

Q Do you know why you came over here instead of having her come to you? A In 1923?

40 Q Yes. A She was acutely sick, sir.

George G. Ornstein, for Defendant, cross.

Q In bed? A Yes.

Q And can you fix the month in which you came over here? A I really couldn't. There is a note down here I saw her in June, 1923, but I don't know whether that is the exact month or how I could fix it. I wouldn't know.

Q She at that time had a tubercular infiltration in the left lung, if I understand you correctly? A Yes, sir. 10

Q And, in plain words, what does that mean? A Well, she had an infection of the left lung that is caused by the tubercle bacillus.

Q That is the beginning of consumption? A Yes, sir; that took on the appearance of—do you want me to go into a scientific terminology?

Q No. I just want a plain explanation. A Or do you want me to speak as a lay individual? 20

Q Yes. A It took on the appearance of pneumonia of the bronchia down into the small little cavities.

Q And turned into a tubercular condition? A Well, tubercular as soon as a tubercle bacillus goes into it. "Tubercular" is the wrong terminology, which means something like. When you say "tubercular" it is not tuberculous. Tuberculosis you mean.

Q It is a tubercular condition of that part? A "Tubercular" means like tuberculosis. 30

Q Well, there are tuberculosis of different organs, are there not? A Yes, but "tubercular" is the term that is used to simulate tuberculosis.

Q This is what you would call a tuberculous infiltration? A Exactly.

Q What is the plain definition of the word "infiltration"? A I would only be able to explain that on the scientific basis. If you want me to, I will do so. 40

George G. Ornstein, for Defendant, cross.

Q I thought you could explain that in a simple way. A The tubercle bacilli get into the tissue, which causes a reaction, which brings out some serum and some multiplication of cells and fibrin and the blood vessels begin to become blocked off and the thing begins to break down due to a
10 combination of poisons and lack of circulation to its parts.

Q And this is one of the first stages to tuberculosis? A Well, that is one of the stages.

Q It is one of the stages? A It is one of the stages; yes, sir.

Q As I understand, you recommended that she go to Saranac Lake at that time? A I did, sir. I made arrangements for her to go to Dr. Mayer.

20 Q Yes. And you said that up there there was a pneumo-thorax performed? A Yes, sir.

Q That is a puncture of the lung, is it? A Not a puncture of the lung; a needle is inserted between the two pleural surfaces and air is allowed to come into this pleural cavity which compresses the lung.

30 Q What is the purpose of this? A When you do that, you accomplish two things: you raise the lung as though it was splinted and you change the circulation from the lung. There is less circulation going through there, so there is less absorption of poisons and the patient feels better because of the fact that less poisons get into the general circulation.

Q And, incidentally, in order that the lung may have more rest and a better recovery? A Yes, sir; that allowed it to recuperate and build up.

40 Q And she came back to you in 1925, as I understand it? A That is right, October.

George G. Ornstein, for Defendant, cross.

Q Yes. A Well, I don't know whether—no, in October the pneumo-thorax was stopped.

Q October, 1925? A Yes, sir.

Q That is when you allowed the lung— A To go out.

Q —to re-expand again? A Yes, sir.

Q And you say that, in your opinion, the tuberculous condition was arrested? A Yes, sir. 10

Q And what do you understand to be meant by "arrested"? A By that I mean that the patient was free of constitutional symptoms and—

Q And— A I am not finished—and that her—she was free of expectoration and tubercle bacilli for six months and an X-ray examination conformed with the impression of a healed tuberculosis. 20

Q That, of course, does not mean that the patient is cured, does it? A Well, she could almost fit into that classification, but we cannot use the word "cured." The National Tuberculosis Association, however, states this, that if a patient is free of constitutional symptoms and free of expectoration and tubercle bacilli and the X-ray has the appearance of a healed tuberculous process for over two years, that the patient may be called "apparently cured." 30

Q That is, if he keeps well indefinitely? A Yes. And this patient was well for four years after we stopped her pneumo-thorax and carried on the ordinary functions in life.

Q If she keeps well indefinitely, why, then, the disease can be said to be arrested? A Yes, sir.

Q And if there is no recurrence of the—of it, doctors sometimes call it a cure, do they? A They do sometimes. 40

George G. Ornstein, for Defendant, cross.

Q Although if it is so pronounced as a cure and a relapse takes place, that indicates the disease has not yet been arrested, does it not? A Yes, sir.

Q There is no doubt about that? A We rarely use the term "cured" in our terminology
10 that we follow that has been outlined by the National Tuberculosis Association; we call it, "apparently cured."

Q It is impossible for anyone to say when a patient passes from a condition of arrest into one of cured? A It is rather thin ice you are stepping on.

Q Yes. You wouldn't want to say that that could ever happen, would you? A Oh, it happens, of course.

20 The Court: Yes, it does.

The Witness: I wouldn't say that it does not happen.

The Court: I know a woman that when she was a young girl went to Saranac Lake and stayed there for two years and came back and married and had four children, and that is thirty-five years ago and she is perfectly healthy.

30 The Witness: I can mention many others.

The Court: Dr. Trudeau told her—was an intimate friend of my sister's—it was very doubtful if she could survive, but she has survived and is perfectly healthy.

Mr. Unger: He lived there himself, Dr. Trudeau?

The Court: Yes. And he died of consumption, too.

40 Mr. Unger: Yes, although he helped thousands while he was there.

George G. Ornstein, for Defendant, cross.

Q Now, of course, when this condition of arrest sets in or takes place and thereafter the patient has a relapse then the arrest is at an end, isn't it, for a time? A Yes, sir.

Q Now, I understand that you suggested that she come in for periodical check-ups, and she did come in for six months at a time there? A Yes, sir. 10

Q And that you visited her in February, 1928? A Yes, sir.

Q This was at her home? A Yes, sir.

Q And this was the time when it had been reported to you by her brother that she was quite ill and you were asked to come over? A Yes, sir.

Q And do you recall what time you got there, doctor? A It was in the evening. I had had a very busy day that day and the only time I could get there was around ten o'clock at night. 20

Q Yes. And your examination took how long? A Well, I wouldn't know how long that particular one took, but my average examination usually takes thirty minutes, sir.

Q Yes. And then it was not until you had completed your examination and had gone downstairs that you met for the first time Mr. Goldstein? A I met him going up the stairs, too. 30

Q You met him while you were coming down and he was going up? A He was there all the time excepting that he was downstairs.

Q And did he go back downstairs with you at that time? A No. He was downstairs. I didn't see him upstairs. He was downstairs.

Q That is what I mean. A Yes, he was there, he was waiting for me.

Q Yes. He had not been in the room while the examination was going on? A Well, I 40

George G. Ornstein, for Defendant, cross.

wouldn't allow that as a physician; he was not married to the girl; I had to undress her.

Q I am asking you, he was not there? A No, he was not there.

Q Of course, he knew nothing of what was going on in the room? A No.

10 Q And you were introduced to him as being engaged to the girl? A Well, they were to be engaged, or, I believe they were engaged, yes.

Q And you proceeded to congratulate him, I suppose, and tell him what a fine girl she was? A Yes.

Q And then do I understand that, unsolicited, you proceeded to inform him of the condition of this girl? A Yes, I did, because I thought he was—he might have been alarmed that it was a tuberculosis process that cropped up.

20 Q Were you asked to do that by anyone? A No, sir; I had—pardon me.

Q You were not asked to do that? A No, sir.

Q And, of course, what had transpired between you and your patient was, as physicians know, privileged between you two? A Yes, sir.

Q And notwithstanding the fact—

30 The Court: No.

The Witness: No, you wouldn't let me—(interrupted).

Mr. Lane: I object to that. He simply opens the door now for the doctor to say what this woman told him, and—I am quite willing to have that door opened.

The Witness: Yes, I tried to say it.

40 Q Notwithstanding the fact that she did not tell you to tell him anything, you decided, of your

George G. Ornstein, for Defendant, cross.

own accord, to disclose it to him? A Well, I had—

Q No, that calls for yes or no. A I can't answer that that way.

The Court: Oh, yes, you can, doctor. You decided to tell him. 10

The Witness: Tell him?

The Court: Yes.

The Witness: Yes, sir, I did. I decided to tell him.

Q Because you thought he ought to know? A I did, sir.

Q And not because she told you that she wanted him to know? A She told me that I may tell him. 20

Q Well, I asked you a moment ago and you said "No." A No. You wouldn't let me speak about that, sir. I didn't say "No."

Mr. Lane: I object to what—the doctor is right. The question that counsel put was, "Did she ask you to tell him?" The doctor says she told him that he might tell him—quite a different thing. 30

Mr. Unger: That is a distinction without any difference.

Mr. Lane: It is a distinction with a great difference.

The Court: I don't see any whatever.

Q Well, did she make a request of you that you tell him? A No, she didn't make a request for me to tell.

Q She did or did not? A She did not. 40

George G. Ornstein, for Defendant, cross.

Q She did not make a request. And did you ask her if you should? A I did, sir.

Q And what did she say? A She said that she told him and that I could tell him.

10 Q Just a moment. What did she say? A She said it was all right.

Q And in that way she requested you to tell him? A Well, if you want to assume that, all right.

Q So it was after you asked her she told you you might? A Yes.

Q So that you had her permission— A I had.

Q —to tell him of that. A Otherwise I would not have dared say it.

20 Q And she had not requested you to tell him until after you had inquired of her that you might? A (Witness nods yes.)

Q You thought he ought to know her condition? A Absolutely.

Q She did not say, did she, that she would prefer to tell him herself? A No.

Q And she did not tell you that she had informed him or told him about it? A She did.

30 Q She did? A She told me that she had told him and I said, "Well, then, I will go down and tell him what your condition is now," so— (interrupted).

Q Well, why, if you know, did you think it was necessary to tell him if she told you she had already informed him? A Because I felt that he might be worried that she had tuberculosis and I wanted to assure him it was just a cold.

40 Q You wanted to tell him in such a way that he would not be unduly alarmed about it? A Exactly.

George G. Ornstein, for Defendant, re-direct.

Q And you wanted to nullify or discount the effect of whatever stories she might have told him? A Oh, I don't—

Q Is that right? A No, I don't—

Q You wanted to lessen his fears on that score? A Well, I didn't particularly think he was going to annul the marriage at that time, I assure you, I mean, a man naturally—I mean, I just don't understand your question. I thought the man might be alarmed as a man in love would, if someone dear to him was ill, and I wanted to tell him that it was not a tuberculous process when it was just an acute cold that was bothering her at that particular time. 10

Q Is that what you wanted to tell him? A Yes, sir.

Q That it was not a tuberculous process? A Exactly. 20

Q But only an acute cold that was bothering her at that time? A Yes, sir.

Q And is that what you told him? A Yes.

Q That it was an acute cold? A An acute tracheal bronchitis.

Q And not a tuberculous condition? A Yes.

Q And that she would be all right soon? A Yes, sir. 30

Mr. Unger: That is all.

Re-direct examination by Mr. Lane.

Q Doctor, what did she say to you? Tell us now the conversation between you and Mrs. Goldstein before you went down to see Mr. Goldstein. A Well, after I examined her, I asked her if she had told her fiance about her condition and she said she did, and then I said, "Well, then I 40

George G. Ornstein, for Defendant, re-direct.

will go down and explain just what has happened and that there is no need of alarm." I told the family this thing would subside and there was not anything particular—to worry about, that her tuberculous process had been aggravated; and I went down and I made this drawing of this thing
 10 for this gentleman. That was the end of it. And then I went back home. By that time it got pretty close to midnight and I thought I ought to get home.

Q Now, the word "relapse" has been used. Will you tell me what that means in connection with tuberculosis? A It means the reactivation of a pre-existing tuberculous process.

Q That reactivity usually springs—or is it
 20 known whether it usually springs from the old condition or from a new infection? A Well, it may occur from either source. It may be a new infection or it may be an activation of an old process.

Q Is there any way by which you can distinguish which is which? A It is rather difficult in a tuberculous individual.

Q Where you have a condition of arrested tuberculosis with the lack of any constitutional
 30 symptoms for a period of four years and then there is a reactivity, what are the probabilities as to whether that reactivity is due solely to the old condition or to a reinfection on the old condition? A Well, that is a much debatable question. I mean, at the present time the investigators are sort of divided between the opinions. You remember the old belief has always been that tuberculosis came from an old process. The new belief is that it is a reinfection from the outside,
 40 but I could not prove it either way.

George G. Ornstein, for Defendant, re-cross.

Q There are those two theories? A Yes, sir.

The Court: Through?

Mr. Unger: Just a moment.

Mr. Lane: That is all.

The Court: Now, doctor—(interrupted).

10

Mr. Unger: Did your Honor want to ask a question?

The Court: Go on.

Re-cross examination by Mr. Unger.

Q You have been answering something with respect to a relapse? A Yes, sir.

Q Isn't it true that tuberculosis is a chronic relapsing disease? A Well, it frequently occurs that way in certain stages of it.

20

Q Isn't that its definition? A Chronic—

Q Chronic relapsing disease. A Oh, no, that is not the definition.

Q Do you know Dr. Lucien Brown? A Very well. He is one of our teachers.

Q Is he an authority on tuberculosis? A He is one of our best teachers.

Q A man of ability and knowledge? A Yes, sir.

30

Q Do you disagree with him? A Yes, sir.

Q That tuberculosis is a chronic relapsing disease? A Of course, I do.

Q You disagree. A In certain stages it may be that way, but there are many stages of tuberculosis.

Mr. Lane: There is nothing to show that the doctor said that.

40

George G. Ornstein, for Defendant, re-cross.

Mr. Unger: We may prove it.

Mr. Lane: I know, but I submit that you cannot get the evidence of Dr.—whatever his name is, in except by producing some standard work or something in which he said so.

10

Mr. Unger: I may do it. I have not finished my case yet.

Mr. Lane: You said that—(interrupted).

The Court: He may cross examine on that. He is perhaps laying a foundation for it.

Mr. Lane: Yes.

20

Mr. Unger: Of course, my proof in the ordinary course of events would have come in first.

The Court: Yes.

Mr. Unger: And that would have included his testimony and that statement would have been in.

Mr. Lane: Is his testimony here?

Mr. Unger: Yes, it is right in the depositions.

30

Q Just one question, doctor? A Yes?

Q Why, if all you wanted to tell Goldstein was that the girl had a cold, or the kind of a cold you said she had, and not a tuberculous condition, couldn't you do that by telling it to us in plain words without drawing a diagram? A No, I couldn't. Because I was trying to explain the mechanical reason for that cold occurring, and I had to draw it.

40

Mr. Unger: I see, that is all.

George G. Ornstein, for Defendant, re-cross.

The Court: Now, before you leave the stand, doctor, I want you to tell me exactly what you said when you went downstairs and talked to Mr. Goldstein. Did you refer in any way to any tubercular condition, past or present?

The Witness: Yes, sir. 10

The Court: Well, now tell me what you said exactly—

The Witness: I took out—

The Court: —about tubercular conditions.

The Witness: I took out my prescription pad, I had my bag with me, took a pencil and made a sketch of the thorax, put in the lungs, showed with my sketching the way the lung was collapsed—the tuberculous lung was collapsed, appearance of the fluid, the impression I had of the thing being healed up, the way the thing re-expanded and pulled the heart and trachea and mediastinum into the left thorax. 20

The Court: This was this time before he was married?

The Witness: That was in February, 1928.

The Court: And then you explained to him that she had had a tubercular condition? 30

The Witness: Well, I—

The Court: —But, in your opinion it was healed, is that right?

The Witness: Yes, sir.

The Court: Are you sure about that?

The Witness: Yes, sir.

Mr. Unger: Pardon me, if your Honor please, the witness did not say what your 40

George G. Ornstein, for Defendant, re-cross.

Honor asked him and I call your Honor's attention to it as to the accuracy, at this time: he did not say he explained to him that she had a tuberculous condition.

10 The Court: I asked him to tell me everything that he said about a tubercular condition. Now, perhaps he ought to amplify that.

I want to know what you said to this man as to her tubercular condition.

The Witness: I made a sketch of the thing showing—

The Court: What did you say? You made a sketch?

20 The Witness: And then I said, "Here is this tuberculous condition," and it was collapsed in the thorax and had completely healed up, that we allowed it to expand, that it had pulled the heart and mediastinum and trachea and things into the left thorax, and this was just a mechanical change which caused the retention of the organisms and bronchia which produced an acute thing there that would completely subside, there was nothing to worry about, I assured the family, they were the ones—(interrupted).

30 The Court: No.

The Witness (continuing): —that were—that she would be all right.

Q I think I have heard you tell this two different ways? A Very well.

Q I will ask you once again. You said you took out your pad? A Yes.

40 Q And you made a sketch of the lung and you showed a lung collapse; is that right? A Yes, that is right.

George G. Ornstein, for Defendant, re-cross.

Q Did you tell him that was due to a tubercular condition? A Well, I don't remember the exact wording that I said, but—I couldn't remember the exact sentences that I said—I mean, the substance of my talk was that it was a tuberculous lung that had recollapsed that had re-expanded and pulled the thing out.

10

Q Now, you tell us the substance of your talk. The substance of your talk may have indicated one thing to you as a doctor and something else to Mr. Goldstein as a layman? A He is a lawyer, sir, he is not—(interrupted).

The Court: Do not argue with counsel, just answer questions.

The Witness: I am sorry.

20

Q Did you explain to him the significance of the collapse of the lung, what it meant? A It had been finished, sir. That was a finished thing. No, I did not go into any details at all, except make a rough sketch and marking it out.

Q You wanted to assure him that there was nothing to worry about? A Yes, sir.

Q From what you had stated before or what you told him, namely, that she had a bad cold and there was nothing to worry about.

30

Mr. Lane: I object to that, that is not true. That is not all she said.

The Court: No.

Mr. Unger: If it is not, he can answer the question for himself.

The Court: Very well. I will allow it.

The Witness: I said her present condition was nothing but a cold and had nothing

40

George G. Ornstein, for Defendant, re-cross.

to do with the process in her left lung that had previously existed.

Q Did you tell him— A Yes, sir.

The Court: Wait a minute.

10

Q No. Did you tell him in so many words that she had or was in one of the stages of tuberculosis? A Well, physicians do not put it that way particularly.

Q Did you put it that way, doctor? A I put the way I—

20

Q Please, doctor, you can answer questions because you have indicated that in the answers you have made to your own counsel. Now, I hope you can answer mine just as well. A Yes, I will. I told the man that he had—(interrupted)

Q Pardon me. Won't you answer the question? A What was the question?

Q (Question read as follows: "Did you put it that way, doctor?") A I didn't put it in the form she was in the stage of tuberculosis. I didn't answer it that way.

Q Did not tell him she had tuberculosis? A I did tell him she had tuberculosis.

30

Q What word did you use? A I said she had had a tuberculous process in which the lungs had been collapsed and the lungs had re-expanded and the pleura thickening pulled the mediastinum and things into the left thorax.

Q Didn't you say within the last ten minutes that you did not use the words "tuberculous process" to him at all, when I asked you? A No, I didn't say that.

40

Q You are willing to stand on your testimony as you had it recorded here? A Well, I wouldn't

George G. Ornstein, for Defendant, re-cross.

want to stand on my testimony, but I will stand on my knowledge of the thing that I did not.

Q I am speaking not of your knowledge but what transpired at that time. A I did say that she had had a tuberculous process in which the lung had been collapsed, sir.

Q And you want us to understand that you told him that? A Yes, sir. 10

Q In so many words? A Well, I don't just understand—if someone would explain to me if I have to answer—I don't know whether it is the exact wording I used; I couldn't remember that.

The Court: Or words to that effect?

The Witness: Yes, sir; words to that effect, I did. 20

Q Now, tell us what you said. A I said that the patient had had a tuberculous process in the lung which—in which the lung had been collapsed and we allowed the lung to come out, there had been a thickening of the pleura—and the lung—and the thickening of the pleura, pulling the mediastinum into the left thorax and the trachea into the left thorax, causing a distortion of the bronchia. 30

Q Then you wound up by telling him that there was a cold? A I didn't say that there was a cold.

Q Well, that she had a cold? A I said at the present time she was suffering from a good cold.

Q And there was nothing to worry about? A Exactly.

Q Although you were taking pains to explain to him that she had a tubercular condition? A Yes. 40

George G. Ornstein, for Defendant, re-cross.

Q And do you say now that you used the word "tubercular" or tuberculosis" to him? A I did in that way.

Q Not "in that way." Directly. A You see what I mean. I don't know—words to that effect.

10 Q I want to know whether or not you used the word "tubercular or tuberculosis." A I never use the word "tubercular" when I mean "tuberculosis."

Q What is that? A I never use the word "tubercular" when I mean "tuberculosis." "Tubercular" means diseases like tuberculosis.

Q What I am asking you is whether you used either of those words to him? A Yes, sir.

Q You say you did? A Yes, sir.

20 Q And then you characterized the whole thing as a cold? A Don't say the "whole thing," you are rather unjust that way. I said she was suffering at that time from an acute cold.

Mr. Unger: That is all

Mr. Lane: That is all, doctor.

The Court: Do you want the doctor any further?

Mr. Lane: I do not.

The Court: You can go, then, doctor.

30 The Witness: Thank you very much, sir.

Mr. Unger: I am going to offer my depositions in evidence.

The Court: Yes. Now?

Mr. Unger: Yes, sir.

The Court: Do you want them read?

Mr. Unger: Yes. I think your Honor ought to hear them.

40 The Court: I certainly ought to hear them. I was wondering whether you wanted

George G. Ornstein, for Defendant, re-cross.

to—if they would fit in now or should I take them and read them myself?

Mr. Unger: Of course, if I don't put them in now, it may be that the force of some of the cross examination later that will be put in, will not be, as far as I am concerned, as effective as though I had the benefit of whatever discovery I get from these depositions, and, if your Honor don't mind, I would like to read them now. 10

The Court: All right, go ahead.

Mr. Unger: These were taken, your Honor please, under a stipulation that they were to be used, they were taken *de bene esse*, without order, and that—

The Court: By consent?

Mr. Unger: By consent, that they should be sworn but not subscribed to and that either party could use them. 20

They were taken on Thursday, September 19, 1929, before Herman Winard, New Jersey Supreme Court Examiner, pursuant to a stipulation which is annexed to the depositions.

I will first offer them in evidence, then I will read them. 30

The Court: I suppose there is no objection?

Mr. Lane: There are some objections taken throughout the record that I object to.

Mr. Unger: I think your Honor can rule on them as we go along, and I will stop where there is an objection.

Mr. Lane: I don't want to waive it. There is one particularly. 40

Deposition of Dr. Lawrason Brown.

Mr. Unger: "Dr. Lawrason Brown, sworn by the Examiner. Direct examination by Mr. Unger:

Q Doctor, you are a licensed physician in the State of New York? A I am.

10 Q And you maintain your office at Saranac Lake, New York? A Saranac Lake, New York.

Q How long have you been a physician? A I think since 1900, over twenty-nine years.

Q Do you specialize in any particular branch? A In diseases of the lungs, more particularly tuberculosis of the lungs.

Q How long have you specialized in that kind of work? A Twenty-nine years.

20 Q Are you connected with any institutions in this vicinity? A Yes. I am connected with the Trudeau sanitarium."

The Court: Isn't that unnecessary? I suppose the qualifications are admitted?

Mr. Unger: It is very short.

"Q That is a larger institution? A Yes, about a hundred and seventy or eighty beds.

30 Q How long have you been connected with it? A I have been connected with it in one capacity or another for twenty-nine years.

Q Are you connected with any other institutions in this vicinity? A I am on the board of trustees of the Ray Brook sanitarium.

Q Where is that located? A That is located about four miles out of Saranac Lake, on the road to Lake Placid. That is a State institution.

40 Q Do both of these institutions treat people affected with tuberculosis of the lungs? A They do.

Deposition of Dr. Lawrason Brown.

Q Have you written some books on tuberculosis?"

The Court: That is all his qualifications. Get down to the testimony.

Mr. Unger: I will have to tie that up to a statement that is coming next, the last one: "I have written a book, a layman's book that you have in your hands. 10

Q Entitled— A Rules on the recovery from tuberculosis.

Q Now, doctor, won't you tell us what kind of a disease tuberculosis of the lungs is? A A chronic relapsing disease.

Q Is it an infectious or contagious disease? A Yes, it is both infectious and contagious. 20

Q Can this disease be transmitted to children or offspring? A Yes. To that I might say less by heredity than by direct contact after birth.

Q It is a germ disease, is it not? A A germ disease.

Q It is contagious and infectious? A Yes.

Q Where is it more apt to flourish, on the inside or on the outside? A You are more likely to contract the disease in the house than you are out of doors because you come in close contact. 30

Q Will you explain how it can be contracted on the inside? A It can be contracted on the inside from dust, from dry secretions, or it can be contracted by dry droplets which patients cough out, which is the more usual way. If you stand in front of a mirror and cough, you will see on the mirror, on the pane of glass, and they may contain germs.

Q Has this disease different stages? A Yes. 40

Deposition of Dr. Lawrason Brown.

Q What are the stages? A Well, they group them in the early, the minimal stage, moderately advanced and the advanced.

10 Q I wonder if you can give us an explanation of what each stage consists? A The name 'minimal' defines the first stage, which means the patient has as little of the disease as you could detect and be positive from the diagnosis. In a moderately advanced stage it means the disease has advanced further, and the following advanced stage is such that the ravages of the disease has the lungs seriously affected, and with very often a cavity in the lung.

20 Q Is this a disease which in your opinion can be cured? A It can be cured, but we never can tell when it is cured; and we think that the vast majority of all patients are never cured, but simply have the disease arrested.

30 Q When you speak of an arrest, what do you mean by that? A We mean by that if the disease is arrested the patient is practically—to the layman he may have no more symptoms and to the physician the disease is not advancing; it may be retrogressing and may be stationary and may never progress again, or it may after several years light up again and go ahead. That is the reason we call it arrested and not cured.

Q Is it possible to determine whether there is a cure in the sense that you speak of until after the lapse of a certain length of time? A No. Time is the only true method, the only true yard stick measuring whether or not the disease is arrested.

40 Q You have told us what you mean by the word 'arrested.' When the disease gets to the point when it may be said to be arrested, from that time on is it true that only the lapse of time

Deposition of Dr. Lawrason Brown.

can determine whether or not there will be a re-occurrence of the disease? A Yes. The disease almost always—I wouldn't say almost always, but in a large number of cases, relapses.

Q Do you speak of a person who has had the disease apparently arrested and distinguish that from a situation where the disease has been arrested? A Yes. When a person loses the symptoms we do so contend that the disease is apparently arrested, after a sufficient length of time—usually for months or even longer; we say the disease is arrested. 10

Q And then if after that a person keeps well indefinitely, then it may be said that the disease has been finally arrested? A Yes, finally arrested, and some people even use the term 'cured,' even though they use it in a sense, though they cannot prove that they are correct. 20

Q Then if after there has been an arrest or an apparent arrest a reoccurrence of the disease takes place, is that or not an indication that no cure has taken place? A Absolutely.

Q How long a time should elapse after a disease has been arrested or apparently arrested before it can be said to be cured in the sense in which you say people use the term 'cured'? A Ordinarily we like to have a patient back living under the ordinary conditions of life, under the usual strain of life, in two or three years, before we can say the patient is apparently cured. 30

Q In your opinion, doctor, is it possible for anyone to say with any degree of certainty or definiteness when a person passes from the condition of an arrest of the disease into a cure? A It is impossible to say that the cure has occurred with any degree of certainty. It is merely a guess. 40

Deposition of Dr. Lawrason Brown.

Q You have stated that this is a germ disease?

A Yes.

Q While the germ is alive in the affected parts can there be a cure? A The disease is not really cured as long as the germ is living in the body, and the germ, you know, can live in the body for
10 years, and we have no method of telling when the germ absolutely dies out in the body.

Q Where a person is afflicted with this disease and marries, in your opinion does sexual intercourse have any effect on that disease? A Sexual intercourse, of course, may affect the disease unfavorably if the person is at all passionate. I think that is the crux. It is more dangerous for a woman, of course, because she may become pregnant, and pregnancy is not a
20 favorable condition.

Q Disregarding the question of pregnancy altogether, would you say that marriage and ensuing sexual relations, insofar as the female is concerned, have a tendency to cause a reoccurrence of the disease, assuming that the sexual relations were normal? A In the majority of cases I don't think it would for a woman; I don't think so.

Q Did you have occasion, doctor, during July
30 of this year to examine X-ray photographs purporting to have been made of Mrs. Regina Goldstein, the defendant in this suit? A I did.

Q From whom did you obtain those plates? A They were submitted to me from the office of Dr. Edgar Mayer.

Q Did you understand that he had been the physician for Mrs. Goldstein? A I did.

Q Were those plates identified in such a way as to enable you to determine whose pictures they were? A Yes. As I recall it, they were
40

Deposition of Dr. Lawrason Brown.

given to me by Dr. Mayer with the understanding that they were Mrs. Goldstein's plates; and I cannot be positive whether or not they had her name on them or not, but they had certain definite numbers and they came from his office, and there was no reason to believe that they were not the plates.

10

Q What plate numbers did they have? A Plate No. 2796 and dated March 28, 1929 and another, a second plate, 3136, dated July 11, 1929.

Q And these were put in your possession? A By Dr. Mayer.

Q And you examined them? A I examined them myself.

Q What did the earlier plate of March 28, 1929, disclose? A It disclosed a very slight disease in the upper third of the right lung, an extensive disease and cavity formation in the upper half of the left lung, and, furthermore, the displacement of the mediastinal contents to the left indicates apparently that the disease has been present for some time.

20

Q You used a technical phrase here in your last answer. I wonder if you won't give us an explanation of that? A The mediastinal contents. The mediastinum is the area, really, between the two lungs and above the heart, and that when it shifts from one side to the other usually indicates that the disease has been existent for some time; and in this case the mediastinal contents has shifted to the side, I think to the left side, which would indicate that the disease was of long standing.

30

Q You also examined the plate of July 11, 1929? A I did.

Q What number was that? A 3136.

40

Deposition of Dr. Lawrason Brown.

Q What did your examination of that plate disclose? A It disclosed a slight amount of disease in the upper third of the right lung and an extensive disease throughout the left lung with cavity formation in the upper third. I furthermore compared this plate 3136 with plate 2796
10 and found that there was an increase of disease on each side.

Q And the interval of time which had elapsed between the taking of the two plates was between March 28th and July 11th, 1929? A Yes.

Q Now, doctor, from the examination which you made from both plates you formed an opinion as to how long the disease had existed? A Well, it is impossible to say how long the disease might have existed, but I formed an opinion that
20 it existed over a considerable period of time. It is impossible to say whether it was one or two or five or six or even ten years, it is impossible to say, on account of the fact that tuberculosis is a relapsing disease and each relapse may not be very serious but very slight, and bring on more and more disease until in the end you find a very extensive disease in the lungs.

Q And based upon the examination as disclosed by these two plates and from comparison
30 between the two, had there or had there not been an increase in the disease or an increase in the extent of the disease between March 28th, 1929, and July 11th, 1929? A There was an extension of the disease.”

The Court: Frankly, I cannot understand how this is material, all of it.

Mr. Lane: I do not, either.

The Court: Mr. Lane limited this whole
40 case, at the beginning, to whether or not he

Deposition of Dr. Lawrason Brown.

knew she had it, and I don't see why you should go into all this stuff about how bad it was and whether it was going on or whether it was a relapsing disease and all that. The only question now before me is, did he know that she had some sort of tuberculosis when he married her?

10

Mr. Unger: I don't want to weary your Honor with testimony in this case.

The Court: Is that all there is to it?

Mr. Unger: No, it is not all. Some of this contradicts her—may contradict some of the evidence that will be put in. It is a part of my case. Your Honor will understand that in this case I am not limited or bound by the admissions. The admissions may not be as broad as I want them to be and yet, admitting that at the time of marriage the party was suffering from tuberculosis, there is no admission in the case, and I do not think I am limited by that.

20

The Court: You put the doctor on just before luncheon and he went into all this.

Mr. Unger: He has not made an examination except in this year, and these are examinations made before that time.

30

The Court: All right. I won't limit you but I can't see how it is material.

Mr. Lane: They have served on us forty-four interrogatories, forty-three of which we answered, although the forty-fourth was too bad to answer, and we answered the others although some of those were objectionable, and in the answers at this time annexed, we concede she had tuberculosis in 1923.

40

Deposition of Dr. Lawrason Brown.

10 Mr. Unger: Well, now, of course, your Honor is running the case and you can decide whether or not you want it but it is a part of the evidence in my case; and this case arises out of fraud, practically, and is based upon a concealment, and there must be corroboration, of course, to the extent the law requires it, and I do not intend to waive any of the proofs which I have made, simply because the admission may be considered to be broad enough.

Mr. Lane has already indicated—

The Court: How much broader do you want?

20 Mr. Unger: Mr. Lane has already indicated by a motion which he might have made, that there was no corroboration in this case about any concealment. I don't know whether that is going to be his contention or not.

Mr. Lane: It is going to be one of them.

Mr. Unger: If it is—(interrupted)

The Court: What I want to know is, how broad do you want this statement that this woman had tuberculosis at the time of her marriage?

30 Mr. Unger: I am not going to ask anybody to state how broad the admission should be, but if Mr. Lane is going to contend, if he has already contended there is no corroboration or proof of certain facts, I want the benefit of any-evidence I have.

The Court: All this is about tuberculosis; that is all admitted.

40 Mr. Unger: Not altogether. There are other things in here. Now, I am willing to have your Honor read the testimony after-

Deposition of Dr. Lawrason Brown.

wards, if you want to, but I don't want to forego the benefit of what is here.

The Court: I don't want to deny you anything. If you want to read it, go on.

Mr. Unger: Yes.

The Court: I tell you quite frankly, I cannot see what it has to do with it: suppose she were dying of tuberculosis and he knew it at the time of the marriage? 10

Mr. Unger: Of course, some of this goes to whether he knew it.

The Court: Of course, that is material.

Mr. Unger: But it is extremely difficult to separate it.

The Court: All you have been reading is about the various kinds of tuberculosis and collapsible, and it doesn't seem to me it makes a particle of difference what kind of tuberculosis she had. The point is, did he know it? 20

Mr. Unger: Then I will offer the testimony.

The Court: I will receive it, of course, if you want me to.

Mr. Unger: And I want you to object to the part of it. 30

The Court: All right. If you want to read it, I will hear it.

Mr. Unger: No. I don't want to read it, in view of your Honor's attitude.

The Court: I don't say that. I will be glad to listen to you, if you want to continue. I just suggested the way I feel about it. I am not going to shut you off at all. If you want to proceed, I will proceed. 40

Deposition of Dr. Henry Leetch.

10 Mr. Unger: I will do this, your Honor please. I will suspend the testimony of Dr. Brown, which deals largely with the condition which he found to exist from the plates, and my examination and cross examination, reserving, however, the right to refer to it if I want to point it out, and I would like to read the testimony of Dr. Henry Leetch—

The Court: All right.

Mr. Unger: —which I think has evidence of another kind. His testimony is found on page 16.

Mr. Lane: I think the evidence of the other kind is only found on page 30, one question, which I shall object to.

20 Mr. Unger: No. I want to read all that, because I think it is part of our case. In other words, it is the kind of evidence which would be permissible if I were to introduce it on the stand, and I don't see any reason why I should be limited to it simply because it is on paper.

Henry Leetch, on page 16:

30 Q "You are a duly licensed physician of the State of New York? A Yes.

Q And you practice in Saranac Lake? A Yes.

Q How long have you been practicing?"

I will pass over, if counsel wants, the qualifications.

40 "Q Do you specialize in any particular branch of medicine? A Tuberculosis."

Deposition of Dr. Henry Leetch.

Mr. Lane: The qualifications are all admitted.

Mr. Unger: "Q Of the lungs or chest?

A Yes, pulmonary tuberculosis.

Q Doctor, are you acquainted with Regina Goldstein, the wife of Gustave Goldstein, the petitioner in this case? A Yes. 10

Q When did you first meet her? A I cannot give you the exact date. It was some time fairly early in 1924.

Q Where was that? A In Saranac Lake.

Q In what place? Whereabouts in Saranac?

A In a boarding house here. I am not quite certain of the place.

Q Under what circumstances? A I was called in to give her a pneumo-thorax two or three times during the absence of Dr. Mayer from Saranac Lake. 20

Q Was she his patient? A Yes.

Q Will you tell us in other than medical terms what this is? A That is a treatment to immobilize the lung, to put the lung at rest by introducing air in the pleural cavity outside of the lung, which collapses the lung and puts it out of commission temporarily for as long as the air is introduced. 30

Q And that treatment is given to patients who are suffering from disease? A Yes.

Q What kind of disease? A From pulmonary tuberculosis in this case, which is either entirely or mainly confined to one lung.

Q Did you get from her a history of the case?

A At that time, no.

Q Did you make any examination or diagnosis of the case at that time? A The only examination of which I have a record or remembrance 40

Deposition of Dr. Henry Leetch.

is the record of the sputum examination which I made on February 7th, 1924. I examined her sputum and found it positive.

Q What does that mean? A Positive for tuberculosis.

Q That indicates the presence of it? A Yes.

10 Q The presence of the germ? A Yes.

Q Did you continue to treat her after that?

A No.

Q When did you next come in contact with her? A In 1929.

Q This year? A Yes.

Q And that was in February? A Yes.

Q Where? A At 88 Riverside Drive in Saranac Lake.

20 Q Under what circumstances did you treat her? A I was called in to see her again during the absence of Dr. Mayer from the village.

Q Did you make an examination of her at that time? A I did.

Q Who was present? A Dr. Greifinger was present the second time I saw her.

Q That wasn't on the first occasion in February? A I believe not.

30 Q Who else was there outside of yourself and the patient? A I don't know if there was anyone.

Q Was her husband there, Mr. Goldstein? A He was there, I am quite certain, on the second examination. I don't remember about the first.

Q Before you made the examination on that day did you get any history of her case up to that time from anyone? A From her, yes.

Q From her in person? A Yes.

40 Q What did she tell you? A I assume that if Mr. Clancy doesn't interrupt me that it is all right for me to answer any of these questions. That is correct, is it not?

Deposition of Dr. Henry Leetch.

Mr. Clancy: Yes, unless I interrupt.

A (Continuing.) The history that she gave me was that of having been quite well until the previous March, which would be March of 1928. As I recall it, it was about March, early in the year, she had contracted a severe cold and bronchitis, and had recovered from that in the fall. I am necessarily hazy on these dates for the reason that she not being my patient I did not transcribe the history; I simply asked her about it to know the time. Sometime during the fall she had commenced to run down and had then found that her disease was again active. That is my memory on the history. 10

Q I assume you are referring to the previous fall, of 1928? A Yes. 20

Q Did she give you any history of the case between or prior to the fall of 1928? A None that I recall, other than she had been quite well and working most of the time between the time that she left here and when she returned.

Q Did she tell you she had been married in the meantime? A She did, yes.

Q Did she give you any further history or any more information about her trouble other than that which you told about? A Do you refer to her physical trouble? 30

Q Yes. A That is as much as I recall.

Q Do you recall whether or not she told you of anything that in her opinion could or might have aggravated the disease or caused a recurrence of it? A Not very well. It is my more or less hazy remembrance that she said she had been doing too much for her strength. That is what every patient would tell you. It is quite obviously true. 40

Deposition of Dr. Henry Leetch.

Q She wasn't any more specific than you say she had been doing too much? A She didn't use those exact words, of course; but that is as much as I can remember of it.

Q I understood you to say that your examination of her took place at some address? A
10 Yes.

Q It didn't take place in your office? A No.

Q I am trying to refresh your recollection, doctor, and ask if you recall that you had a conference with Dr. Greifinger before she was examined. I may be wrong about it. I am just trying to recall it to you to see if that isn't so. A Yes, I did.

Q Was that in the presence of Mrs. Goldstein? A No.

Q Did you get from him any history of the
20 case? A My recollection of the conference was simply the usual talk that any member of the family would have had with me before I examined her. She was in very low spirits; and, as I recall it, his conference was simply to ask me to make things appear as bright as possible for her in order to cheer her up.

Q Without going into any history of what had happened? A I don't recall any.

Q Was Mr. Goldstein also present at that
30 time? A No.

Q I am speaking now of the preliminary meeting in which he told you to brighten her up. A Yes.

Q Was Mr. Goldstein there at that time? A I believe not.

Q Then you did make an examination of her later in that day? A Yes.

Q Where did that take place? A 88 Riverside Drive, Saranac Lake.

40 Q That is the Lynch cottage? A Yes.

Deposition of Dr. Henry Leetch.

Q Was anybody present at that examination?

A Dr. Greifinger and Mr. Goldstein were present.

Q In the room? A As I recall they were.

Q What did that examination consist of? A An ordinary physical examination of the chest.

Q What did it disclose? A It disclosed a pathology in the left lung. Do you want me to describe that? A Oh, yes. I want you to describe the condition you found at that time. A I found an impairment of note over the left lung with diminished breath sounds, a few moderately coarse rales in the upper half of the lung. The right lung was apparently normal. The interpretation of that doesn't mean anything to you, I presume. You want my interpretation?

Q Yes, what that condition indicated to you?

A It indicated to me, in the light of my previous knowledge of her, that she had a thickened pleura, which is the usual after result of pneumo-thorax, that she had some disease at least in the upper part of the left lung. That is as much as I could interpret from the physical examination alone.

Q Did this examination indicate to you whether or not the disease had increased since the last time you had examined her in '24?

A I didn't examine her in '24. In any case I couldn't examine her lung at that time because it was collapsed.

Q This was the examination of February 20th. Did you prescribe anything for her at that time?

A Either at that time or subsequently I prescribed for her a nerve sedative.

Q Did you then express an opinion as to how long she would have to remain at Saranac Lake?

Mr. Clancy: To whom—to her?

Deposition of Dr. Henry Leetch.

A To her I may have.

Q I assume this was all in the presence of the husband? A I may have expressed such an opinion. Frankly, whatever I told her didn't mean very much. She was very depressed, and while I felt that she was probably due for at least six months to a year on the cure, I didn't feel at that time that she was in the proper mental condition to be told such a thing.

Q You probably made light of it as far as she was concerned? A Yes.

Q In an endeavor to make her feel better? A Yes.

Q Did you discuss the matter with her husband on that day? A As I recall it, I made an appointment with him. I saw him in the morning of that day—isn't that right, Mr. Goldstein—and discussed the thing fully with him.

Q That is preliminary to the examination. A Prior, yes. So, I don't believe I talked very much with him. He remained with her while I talked with Dr. Greifinger downstairs.

Q Of course, you didn't discuss her condition or what you had found with Mr. Goldstein in the morning because you hadn't yet examined her? A I had examined her a day or two previously.

Q Prior to February 20th. I am speaking now of February 20th. A No, I didn't discuss it with him before.

Q Was there a subsequent examination three or four days later? A Yes; I examined her when I saw her again.

Q Who was present at that examination? A There was no one present at one examination. At the other one Mr. Goldstein and Dr. Greifinger were present.

Q And then at the second one— A That was the second one, I am quite sure. The first

Deposition of Dr. Henry Leetch.

one I saw her before Mr. Goldstein and Dr. Greifinger had arrived.

Q That is the examination that you have testified to? A The examination at which Mr. Goldstein was present.

Q After the second examination, as you put it, did you have a conference with Mr. Goldstein and Dr. Greifinger in your office? A Yes. 10

Q And on that occasion was there an examination of X-ray plates? A Yes.

Q Where did these X-ray plates come from? A They came from Dr. Ornstein's office.

Q How did they get to you? A They got to me from our X-ray files. Dr. Mayer had previously received them, rather, from Dr. Ornstein or Mrs. Goldstein; I can't state.

Mr. Clancy: I object to all the testimony on the X-rays unless the X-rays are presented and properly proved. 20

Q The X-rays came from Dr. Mayer's file? A Yes.

Q And that file was made available for you? A Yes.

Q And these X-rays were examined by you in the presence of Dr. Greifinger? A Yes. 30

Q Did he tell you what they were?

Mr. Clancy: I object to that for the reason that the defendant was not present.

A I don't know that he told me in so many words that they were Mrs. Goldstein's plates. I naturally assumed, since I had no reason to think that Ornstein or Mayer would fool me, that the plates that were labeled Mrs. Goldstein's were Mrs. Goldstein's plates. 40

Deposition of Dr. Henry Leetch.

Q You proceeded upon the assumption that they were? A Yes.

Q And they were identified in some way? A They had her name attached to the plate.

Q Did they have the name of any physician attached? A That I cannot say.

10 Q Did Dr. Greifinger participate in the examination which you made that day and read them with you? A Yes.

Q Did he dispute the fact that they were Mrs. Goldstein's plates? A No.

Q Or question them in any way? A No.

Q You know Mr. Plank? A Yes.

Q He is an X-ray man? A Yes.

Q Did he participate in this conference? A He was present in the office at the time of the conference. I cannot recall absolutely that he participated in the conference; but I assume that he probably did, since that would be the ordinary and reasonable thing for him to do were he present.

20

Q Do you remember that he went into the dark room and examined the X-ray plates with you? A I think the previous question answers that as well as I can answer it.

Q How many of these plates were there? A Several is all I could say. They were sent back to Dr. Ornstein quite shortly afterwards.

30

Q By whom? A By Dr. Mayer.

Mr. Clancy: I object to that and ask that it be stricken out.

Q You understand? A I understand that they were sent back to Dr. Ornstein. I haven't seen those particular plates since February.

Q Do you recall the date upon which these X-ray plates were made? A I do not.

40

Deposition of Dr. Henry Leetch.

Q Do you recall the year? A You are speaking of Dr. Ornstein's plates?

Q I am asking you whether you recall the date upon which they were made as would appear from the notation on the plates. A Unquestionably the exact date was on the plate. I don't recall that; but my memory is that they were fairly recent plates since they would have been of not much value otherwise; and it is my impression that they were taken sometime during the late fall or winter of 1928. 10

Q Do you recall whether any of them went back to 1927? A No.

Q What did they show? A They showed a very marked thickening of the pleura throughout the left lung, which was so dense that most of the lung markings were hidden. However, there was an annular shadow or rarefaction in the upper third of the left lung, which gave the appearance of cavitation. Such plates are extremely difficult to read so that anything that is seen in the lung is so under this thick white appearance that the pleura has that it is to be guessed at rather than definitely diagnosed. 20

Q Did you form an opinion based upon your examination of the plates at that time as to the disease with which Mrs. Goldstein was then afflicted? A Just a moment. I forgot to state that the right lung was practically normal. By that I mean there was questionably a small scar in the first interspace—that is, between the first and second ribs, as it appears on the plate. 30

Q. (Last question read by stenographer.) A That is, assuming that I knew nothing of Mrs. Goldstein except what I saw in the plate,—is that what you mean? 40

Deposition of Dr. Henry Leetch.

Q No,—including what you would ascertain from the plate and taking into consideration the past history of the case as you knew it.

Mr. Clancy: And your examination of her.

10 Mr. Unger: Oh, yes.

A From my examination of her sputum which I made in 1924, I knew she had tuberculosis of the lung.

Q And she had had it for what period of time? A To my knowledge, since February 7th, 1924.

Q Your examination made in your treatment of her in 1924 and your examination made in 20 1929 confirmed that belief, did it? A Yes.

Q Did you observe whether her lung had been let out in 1929? A Yes.

Q That is a medical expression? A That is as good as any expression. The lung had been allowed to re-expand; the pneumo-thorax was discontinued.

Q On this occasion did Mr. Goldstein ask you what the matter was with his wife? A He did.

Q What did you tell him?

30 Mr. Clancy: I object for the reason that the question calls for an answer which is hearsay, which is a conclusion and not made in the presence of the defendant.

A That she had pulmonary tuberculosis involving the left lung.

Q Did he ask you how long in your opinion she had been suffering from it?

40 Mr. Clancy: The same objection.

Deposition of Dr. Henry Leetch.

A Yes.

Q What did you tell him?

Mr. Clancy: The same objection.

A That she had had it since the time—to my knowledge, since the time that I had seen her in Saranac Lake in 1924. 10

Q Did he ask you whether or not in your opinion she should have married?

Mr. Clancy: The same objection.

A That I cannot say.

Q You don't recall? A I don't recall. It is my impression that he did not.

Q Did you tell him in terms which were not medical just what the condition of her lung was? 20

Mr. Clancy: The same objection.

A Yes.

Q Do you remember what you told him? A I told him approximately what I have testified, that she had pulmonary tuberculosis involving at least the upper portion of the left lung with a probable cavity of the apex, and an extremely thickened pleura throughout. 30

Q Did you indicate to him the probable duration of her illness in your opinion?

Mr. Clancy: The same objection to the entire line—I don't have to interrupt—for the same reasons.

You mean the future, Mr. Unger?

Mr. Unger: Yes.

A I told him that she must have had it since she was here in 1924. 40

Deposition of Dr. Henry Leetch.

Q Do you recall whether he asked you if in your opinion an operation would be necessary?

A He did.

Q And your answer was what? A My answer was that if she did not respond to rest in bed such as she has had, it might be advisable to give her one or both of two operations in the order named, first, phrenicotomy; this not being successful, thorocoplasty.

10

Q Was that your opinion? A Yes.

Q Do you know whether or not he asked you if she became better or made a recovery would she be able to resume household duties, matrimonial relations, and bear children, and so forth?

A I don't recall that.

Q You said that you expressed yourself as being of the opinion that it might be necessary to resort to one of two operations. A One or both.

20

Q One or both operations. Why? A Why would she have to have one or both?

Q Yes. A You will recall when I answered your first question about the operations I said if she didn't respond to the ordinary rest she might have to undergo one or both of these two operations. The phrenicotomy, which is the first I mentioned, is a very minor operation which sometimes will prevent the necessity for the very widespread and serious operation—extensive, I should say, and serious operation of thorocoplasty, which is the removal of portions of all of the ribs.

30

Q The disease of tuberculosis has its different stages, has it not? A Yes.

Q In your opinion, what stage had it arrived at so far as it concerned Mrs. Goldstein? A I will have to qualify that answer. If my interpre-

40

Deposition of Dr. Henry Leetch.

tation of her X-ray plate is correct, that the rarefied area in the apex is a cavity, she would automatically fall into the group which is termed far advanced.

Q Of course, your statement that one or both of these operations would be necessary was predicated upon the fact that the disease was then far advanced. 10

Mr. Clancy: I object to that for the reason the doctor had already testified that if she didn't respond to rest in bed, then either one or both of these operations might be necessary.

A No. Those operations are given in moderately advanced cases. 20

Q Let me ask you, doctor, whether you recall discussing the plate with Dr. Plank and you and he coming to the conclusion that a cavity existed.

Mr. Clancy: I object to the conclusion, the doctor testifying that Dr. Plank came to a conclusion.

Q I am trying to refresh your recollection of that. I only want the fact. A It was my opinion and his opinion— 30

Mr. Clancy: (Interrupting.) I object to that and ask that be stricken out—my opinion and his opinion.

A (Continuing.) I will say this: It was my opinion that this was in all probability a cavity.

Q Do you know whether anything was said on that occasion to indicate the size of it? 40

Deposition of Dr. Henry Leetch.

Mr. Clancy: I object to that for the reason if there was any indication of the size of it, it would indicate by the plate.

Mr. Unger: I am referring to the plate.

10 A That would be the only way of telling the size, and that was as obvious to Mr. Goldstein and Dr. Greifinger as to me.

Q Was it pointed out by anyone? A It was pointed out by me.

Q On the plate? A Yes.

Q Do you remember the area of it or size?

Mr. Clancy: My objection still goes to this question.

20 A Approximately an inch and a half to two inches by an inch.

Q To whom did you turn the plates over when you were finished with them? A I put them back in Dr. Mayer's X-ray file.

Q Do you know whether or not anything happened on that occasion to indicate whether Mr. Goldstein, the petitioner, had ever been informed of the condition of his wife?"

30 Mr. Lane: That is objected to and the objection is continued: out of the presence of Mrs. Goldstein and calls for a pure self-serving statement or act.

The Court: Read the question again.

Mr. Unger: "Do you know whether or not anything happened on that occasion to indicate whether Mr. Goldstein, the petitioner, had ever been informed of the condition of his wife?"

40 Now, I think it is competent for this reason: there is a charge in the case that he

Deposition of Dr. Henry Leetch.

knew of the wife's condition before the marriage.

The Court: Well, that is the answer.

Mr. Unger: Yes. And it seems to me that this will indicate, or have a tendency to indicate, whether or not he was or was not surprised from what he learned there. 10

Mr. Lane: That is no more nor less than saying, if Mrs. Goldstein says, as she will say, that prior to the marriage she told Mr. Goldstein all about this condition, they can prove that she did not tell him because this conference took place after the litigation, after the case was started, Mr. Goldstein said she did not tell him.

The Court: I will sustain the objection. 20

Mr. Unger: If your Honor please, part of this in fact—I will pass on to the next question then. I don't want to—of course, we are not before a jury, but the next two or three questions deal with the expression of Goldstein towards Dr. Greifinger when, as we claim, he was informed of this, and his corroboration of Goldstein's testimony.

Mr. Lane: They are all over objection and they are nothing but expressions of opinion and statements of conduct of Mr. Goldstein, self-serving statements out of our presence. I submit they were—(interrupted). 30

Mr. Unger: No. They were in the presence of Dr. Greifinger. That testimony—

Mr. Lane: Suppose it was?

Mr. Unger: —is already in.

Mr. Lane: Perhaps it was improperly in. I withdrew my objection, but that does not 40

Deposition of Dr. Henry Leetch.

compel me to withdraw my objection to everything.

Mr. Unger: It was corroboration on the same point.

Mr. Lane: I object to it.

The Court: I will sustain it.

10

Mr. Unger: Page 31: "Q Was he—" And this refers to Goldstein—"charging Greifinger with a concealment of the condition of this girl?" And that is objected to.

Mr. Lane: It is exactly the same thing.

The Court: The same.

Mr. Unger: Well, this is corroboration on that point and is an indication of what Greifinger said. Under the circumstances, I think it is permissible.

20

The Court: I will sustain the objection.

Mr. Unger: Now, Mr. Lane, do you want me to read the cross examination by Mr. Clancy there?

Mr. Lane: No.

Mr. Unger: All right.

Mr. Clancy: Your re-direct is page 35.

30

Mr. Unger: Yes, page 35. This is re-direct of Dr. Leetch:

"Q You don't think this disease can be transmitted congenitally? A I don't believe so.

Q If it is not transmitted, isn't there a great danger that offspring would be predisposed to it?

A Yes.

Q Did you receive from Mrs. Goldstein in 1929 a history of her case? A Yes.

40 Q Did she at that time say that she had indulged in any unusual sexual intercourse or

Deposition of Dr. Henry Leetch.

had had any unusual excitement which had arisen from it? A No.

Q Did she say she had sustained any blow or injury to her body? A No.

Q Did she say that the conduct on the part of her husband had been bad and that he had **borated** her or that he complained that she had been interfering with his social obligations? 10

A I don't recall that she did.

Q Did she make any complaint that any treatment on his part had in any way contributed to her then condition? A I don't recall that she did.

Q About as much as she had told you, she had done too much?

Mr. Clancy: I object to that. It calls for a conclusion. 20

Q I don't want you to tell me whether that is your conclusion; but I want you to tell me whether those were the words. A Yes. I can't say whether they were the words she used; but she told me in one way or another that she had been too active.

Q A general characterization? A Yes.

Q And you prescribed this medicine for her nerves just the same as you would have prescribed for another person's nerves, would you not? A Yes. 30

Q Did her nervousness appear to you to be any different than that which would exist in any person ordinarily?

Mr. Clancy: I object. It is leading and immaterial.

A No.

Deposition of Dr. Henry Leetch.

Q You said she was depressed? A Yes.

Q And I presume it is true, is it not, that most persons who come up here to be treated for this kind of disease are depressed?

10 Mr. Clancy: I object; it is immaterial.

A Yes, many of them."

I have some more testimony, which I won't read at this time, but I would like the right to reserve the right to put it in if I think it is material or to contradict any of the defense.

20 The Court: Of course, you may put it all in, if you want to, but I, frankly, fail to see where it is material, after the admission of Mr. Lane, and I don't suppose Mr. Lane cares how ill this woman was, if this man knew that she was ill of consumption, the degree of her illness makes no difference.

Mr. Unger: Not a bit.

30 The Court: If he knew that she had incipient consumption, it was up to him to investigate to see how serious it was. Now, I thought we were going to confine this issue to the mere fact of whether or not he knew it.

Mr. Unger: All right.

The Court: Now, the only evidence that bears on that point, up to date, is his own and this doctor that was here. All the rest, it seems to me, is besides the mark.

Mr. Lane: That evidence of his in this annulment case, fully without corroboration—

40 The Court: You mean Goldstein's?

Colloquy.

Mr. Lane: Mr. Goldstein's, there is not one iota of corroboration that there was any concealment or that there was any—(interrupted).

The Court: Well, that is a matter of argument. I am not going to decide that, but I would like you gentlemen very much, if you consistently can, without thinking that I am trying to shut you off, to keep to that one point. 10

Mr. Unger: Yes.

The Court: "Did he know when he married her that she had tuberculosis?"

Mr. Unger: Well, I will try and confine the issue.

The Court: There is no use of going any further, it is ten minutes to four. 20

Mr. Unger: I have some interrogatories and their answers which I will offer in evidence, which I will not read at this time, but I would like to have considered as in evidence and with the understanding that I may resort to them.

The Court: Yes.

Mr. Unger: (Continuing.) From time to time, as I see fit. 30

The Court: Well, have they been answered?

Mr. Unger: They have been answered.

The Court: Well, there is one—

Mr. Unger: Sir?

The Court: There is one that was not answered.

Mr. Unger: Well, I am not questioning the answers. I am taking them as they are 40

Colloquy.

and I am offering the interrogatories, the interrogatories and their answers, sworn to on October 8th, 1929.

The Court: I do not think there is any use of putting on another witness.

10 Mr. Unger: The petitioner's case is through.

The Court: You don't want to put on a witness ten minutes to four, do you?

Mr. Lane: No, sir.

(Interrogatories marked Exhibit P. 2.)

20 Mr. Lane: Counsel now having offered in evidence the interrogatories and their answers, we have the situation where Mr. Goldstein now stands without corroboration, and the doctors and Mrs. Goldstein have already testified.

Mr. Unger: We will meet that in the law when we come to it as to whether or not the corroboration which is required in this case is as required in certain other kinds of cases.

30 The Court: It seems to me you better set another day, because it seems quite apparent you won't agree. When you set that, counsel can come to my chambers and we will all go to the Prudential together.

(POSTPONED TO NOVEMBER 12, 1929, 11:00 A.M.)

Marcus H. Greifinger, for Defendant, direct.

THIRD DAY.

November 12, 1929.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Milton M. Unger, for petitioner; Merritt Lane and John Clancy, for defendant. 10

MARCUS H. GREIFINGER, sworn for defendant.

Direct examination by Mr. Clancy.

Q Dr. Greifinger, are you related to the defendant? A I am. 20

Q And what relationship do you bear? A Her brother.

Q And you are a physician and surgeon in the State of New Jersey? A I am.

Q And how long have you been? A I graduated 1924, licensed since 1925.

Q And since 1925 have you specialized in any branch of medicine? A No, sir.

Q How long have you known the petitioner, Gustav L. Goldstein? Since the end of 1927 some time. 30

Q How long prior to his marriage to your sister did you know him? A About, I imagine, about seven months.

Q Now, were you present at the time your sister became engaged to Mr. Goldstein? A I was.

Q What happend then? A At the time? 40

Marcus H. Greifinger, for Defendant, direct.

Q Where was your sister at that time? A I don't understand what you mean, at the time of the engagement.

Q Where was your sister living at the time she was engaged? A Oh, at 225 Pomona, my own home.

10 Q And what was the condition of her health at that time? A She was ill.

Q Was she confined to her bed? A She was.

Q And did the petitioner call on her there? A He did.

Q How frequently? A Oh, I would say, three or four times a week.

Q And over what period of time at that time was she confined to her bed? A She went to bed around the end of January, 1928, and was in
20 bed for about five or six weeks.

Q And when did they become engaged? A They became engaged in the early part of February.

Q Did you have any conversation with the petitioner before his engagement to your sister? A At the time—

Q With respect to her health. A Before her engagement, no.

Q After her engagement? A Yes, sir.

30 Q When? A In May of 1928.

Q Will you tell us the circumstances of that? A They were engaged and I was sitting in the living room downstairs and Mr. Goldstein was waiting for my sister to get dressed and he was asking me about plans for a honeymoon. This was before they were married and I told him then that he ought to realize that she was an arrested case of tuberculosis and that he should not make any extensive plans or plans that would wear
40 her out. He spoke of a trip to Europe and I

Marcus H. Greifinger, for Defendant, direct.

told him I did not advise it and he insisted on a trip out west by train. I told him if he would make frequent stop-overs and stay for several days to give her a chance to recuperate, it would be all right. I also told him then that I did not think it advisable that they should have children for two or three years anyhow and he said that agreed with his plans, anyhow. 10

Q Did you tell him why you did not think she should have any children? A I did. I told him then at the same time that on account of her previous tuberculosis it was not advisable for her to have children.

Q Now, were you at the house on an occasion when Dr. Ornstein came over? A I was. I brought him.

Q And was Mr. Goldstein there then? A He was. 20

Q When was that? A That was on February 7, 1928.

Q And what happened that time? A Dr. Ornstein and I went up to my sister's room where she lay ill and he examined her and told us what she had that she had a cold and—

Mr. Unger: Didn't hear that.

The Witness: She had a cold. 30

Mr. Unger: A cold?

The Witness: Cold. And told her there then—(interrupted).

Q Was Mr. Goldstein present upstairs there at that time? A No.

Q Tell us what happened when he was present and what was said. A When we came downstairs, Dr. Ornstein and I, I introduced Mr. Goldstein to Dr. Ornstein and told him that he was— 40

Marcus H. Greifinger, for Defendant, direct.

10 that they were engaged and about to marry and he explained to Mr. Goldstein at that time that she had a cold, but on account of her previous condition, that she had an arrested case of tuberculosis, that that cold might take longer for her to heal than a normal person, and at the same time he drew pictures for Mr. Goldstein of her previous condition, showing how the lung had been collapsed and everything pushed over to the left side on account of that.

Q What did Mr. Goldstein say? A Mr. Goldstein didn't say anything.

Q Do you remember the discussion about the trachea? A Yes, sir.

Mr. Unger: Objected to.

20 The Witness: Very well.

Mr. Unger: Objected to. Very decidedly leading.

The Court: I will sustain the objection.

Mr. Clancy: It was already testified to by Dr. Ornstein and it is corroborative of the testimony of Dr. Ornstein.

Mr. Unger: It does not excuse a leading question under any circumstances.

30 The Court: I will sustain the objection.

Q Can you remember anything else that was talked about at that time? A Well, when Dr. Ornstein explained to Mr. Goldstein her previous condition, he made use of several words which might have—which Mr. Goldstein might not have understood and he asked us then what they were. One of them was the trachea. He didn't understand what that was and we told him it was the wind pipe. For a long time after he was always
40 kidding me about trachea this and trachea that.

Marcus H. Greifinger, for Defendant, direct.

Q Now, after that time how long was your sister confined to her bed? A She was confined to bed after that time about, well, I would say three or four weeks. I don't recall exactly.

Q Did you see the petitioner there? A Oh, yes.

Q (Continuing.) During that time? A Oh, yes. 10

Q How frequently? A Three or four times a week, even more.

Q Now, when was it that you went up to Saranac with Mr. Goldstein? A I went up to Saranac with Mr. Goldstein in February of this year. It was around the 20th, Washington's Birthday, before Washington's Birthday.

Q Where did you go? A We went first to the Hotel Saranac; we engaged a room there. From there we went to visit my sister. 20

Q Was that the first time you went up with Mr. Goldstein? A The first time I went up with Mr. Goldstein.

Q What happened up there then? A Well, we stayed up in the hotel there. We visited my sister several times, looked around the town and we went to see her physician, Dr. Mayer, but he was out and we spoke to Dr. Leetch about her. And we also met Dr. Leetch at her boarding place, at her cottage and he explained to us just what was bothering her, and we continued to go around the town, and Sunday we came back home. 30

Q Did you come home together? A We came home together.

Q Were you on friendly terms with him? A Not at all.

Q Were you on friendly terms? A Friendly terms? Oh, yes, sir. 40

Marcus H. Greifinger, for Defendant, cross.

Q Now, who made the arrangements to send your sister up to Saranac? A Dr. Ornstein.

Q And did anyone go up with her? A Mr. Goldstein went up with her.

10 Mr. Clancy That is all.

Mr. Unger: That is all.

The Court: Any cross?

Cross examination by Mr. Unger.

Q I understand you to say, doctor, that you knew Goldstein since 1927 and that you knew him seven months prior to the time when they were engaged, is that right? A Prior to the time they were married.

20 Q Prior to the time they were married? A About that.

Q And during the time that they were engaged, I presume he was calling pretty steadily at the house? A He was.

Q Yes. And at no time prior to their engagement had you mentioned anything to him about the condition of your sister? A Prior to the engagement?

30 Q Yes. A No, sir.

Q Although, prior to the engagement she had medical treatment at Lake Saranac? A Prior?

Q She had gone to Lake Saranac before that time? A Four or five years previous.

Q Yes. You did not mention that to him, of course? A I didn't know the man very well, didn't speak to him very much.

40 Q I don't care whether you knew him very well. You knew he was coming to call on your sister, didn't you? A Prior to the engagement?

Marcus H. Greifinger, for Defendant, cross.

Q Yes. A Yes, there were other people calling on my sister. I didn't tell them, either.

Q Yes, but they are not concerned in this case, doctor? A Yes.

Q You made no mention of that fact to him, did you? A Prior to the engagement?

Q Yes. A No. 10

Q In fact, as far as you have testified, there was not a single word which you ever mentioned to him prior to the engagement regarding her physical condition? A I did not mention any.

Q No doubt about that? A I did not mention any.

Q Yes. And in May of 1928 you say that he asked you about plans for the honeymoon? A Yes, sir.

Q And they had been engaged since February of 1928? A Yes, sir. 20

Q Had you, between February, 1928, and May, 1928, when he discussed with you plans for his honeymoon, made any mention to him about your sister's physical condition? A I don't recall any definite time between February and May, but I do recall that he was told in February, and, as long as he didn't bother about it, I didn't.

Q No, I am speaking now of you. I want to know whether you told him at any time between February and May, 1928, anything about her physical condition, and it was during that time that she was very sick, wasn't it? She had been very sick in February, 1928? A No; she had a cold in February, 1928, not very sick. 30

Q Well, she was so sick that you were alarmed, weren't you? A No.

Q Is Dr. Ornstein mistaken about that when he says that you were very alarmed and sent 40

Marcus H. Greifinger, for Defendant, cross.

for him? A I don't think he is mistaken, either. He had been taking care of her for a long time.

10 Q I didn't ask you whether he had been taking care of her. I am asking whether or not you were alarmed in February, 1928? A I was not alarmed.

Q And did you tell him that you were alarmed? A Did I tell who?

Q Dr. Ornstein. A No. I asked him over to examine her.

Q Yes. You did not tell him prior to the time when he came in February, 1928, that you were alarmed about her condition? A No.

Q No. He is mistaken about that, is he, if he says so? A I don't know whether he says so.

20 Q Well, upon the assumption that he did, he made a mistake, did he?

Mr. Lane: I object to that, the characterization of the testimony of another witness.

The Court: I will sustain the objection.

Q Well, anyway, you were not alarmed, were you? A I don't recall that I was alarmed.

30 Q Well, now, you ought to know, it is this year? A What was this year?

Q It was February of this year, 1929? A Wait a minute.

Q February, 1929. A February—no it was not.

Q Isn't that the time you have been telling us about? A No.

Q What time were you referring to? A I am talking about February, 1928.

40 Q February, 1928? A Yes.

Marcus H. Greifinger, for Defendant, cross.

Q Well, do you remember now February, 1928, the occasion when Dr. Ornstein came? A Surely I remember the occasion.

Q Were you alarmed about your sister's condition? A No, I don't recall that I was alarmed.

Q You were not alarmed? A Not at that time, no. 10

Q She was in bed for five or six weeks? A I didn't say she was in bed five or six weeks.

Q Well, she had been in bed for five or six weeks on that occasion, hadn't she? A No.

Q She had been sick since Thanksgiving Day, the previous Thanksgiving Day, hadn't she? A I think you are all wrong.

Q All right. A You have got your years mixed, that is all. 20

Q When did she take to her bed? A At what time, what year?

Q 1928. A 1928?

Q Yes. A The end of January, 1928.

Q At the end of January, 1928? A Yes, sir.

Q And when did Dr. Ornstein come? A February 7, 1928.

Q So she had been in bed for some time when he came? A What do you call "some time"? 30

Q Well, a few weeks. A A week or two.

Q All right. And you were not alarmed about her condition? A No.

Q All right. Now, why did you send for Dr. Ornstein? A Because Dr. Ornstein had been treating her, and I make it a rule that I don't treat the family very much and I sent for Dr. Ornstein.

Q All right. And he came? A He came, yes, sir. 40

Marcus H. Greifinger, for Defendant, cross.

Q On this occasion when he came were you the one that introduced him to Mr. Goldstein?

A I believe so.

Q Now, where did the introduction take place? A Downstairs in the living room.

10 Q Now, was that before or after he had made his examination of your sister? A I don't recall.

Q Well, was Gus Goldstein there when Dr. Ornstein came? A I don't recall.

Q No. Was Mr. Goldstein in the room when your sister was being examined? A I was upstairs. I don't recall. I know he was there when we came down.

Q And it was that time, was it, that Dr. Ornstein spoke to Mr. Goldstein? A Yes.

20 Q So he spoke to him after he had examined your sister? A Yes.

Q And what was it he said to him? A To him?

Q Yes. A He said to Mr. Goldstein that she was in an arrested case of tuberculosis and that she had a cold at that time, and he drew pictures for Mr. Goldstein to show what had been done for her in the previous illness.

30 Q You are sure that the first thing he said to Mr. Goldstein was that she had an arrested case of tuberculosis? A I am sure what? Will you repeat?

(Question read as follows: "You are sure that the first thing he said to Mr. Goldstein was that she had an arrested case of tuberculosis?")

40 A I don't know whether that was his first words. He congratulated Mr. Goldstein upon his being engaged to my sister; told him that he

Marcus H. Greifinger, for Defendant, cross.

knew her for a long time and then he spoke of her condition.

Q So that he first proceeded to congratulate him? A Yes.

Q And then he alluded to her physical condition? A Yes.

Q And how long did he talk to Mr. Goldstein? A A few minutes. 10

Q Yes. Now, won't you tell us again, what he said to Mr. Goldstein, not with reference to how fine a girl she was, but with reference to what ailed her? A He explained to Mr. Goldstein that she was an arrested case of tuberculosis and that she had a cold, which, on account of her previous condition would take longer to heal than in a normal person, and he also drew pictures of her previous condition. 20

Q Did he tell Mr. Goldstein that he had nothing to worry about? A I don't know if the worrying was mentioned; I don't recall.

Q Did he tell Mr. Goldstein that there was no tubercular condition? A (Witness nods no.)

Q What is your answer? A He did not.

Q You and he disagree quite sharply about what he told him at that time, don't you? A On that—(interrupted). 30

Mr. Lane: I object to that.

The Court: I will sustain the objection.

Q You are very sure, are you that he mentioned the word "tubercular"? A Tuberculous.

Q Which was it? A Tuberculous, an arrested case of tuberculosis.

Q He started out by telling Mr. Goldstein that she had a cold; is that right? A He told Mr. Goldstein that she was an arrested case of tuberculosis and that she had a cold at the time. 40

Marcus H. Greifinger, for Defendant, cross.

Q Well, now, which did he say first? A He talked about the arrested case of tuberculosis.

Q First? A First.

10 Q Well, didn't he say that she had a cold and on account of a previous case of arrested tuberculosis it would take a longer time to heal? A I explained that he said she was an arrested case of tuberculosis.

Q I don't care— A (Continuing) And that she had a cold at that time.

Q —what you explained. I want to know if that is what he did not say? A What he did not say?

20 Q Isn't it true that that is what he did say, that she had a cold and on account of a previous case of arrested tuberculosis it would take a longer time for her to heal? A I don't recall that he said that now.

Q Those are your exact words; I repeated them, what you said on direct examination, and you say now that you do not recall? I quoted you your own words. A The substance of it is the same to me.

Q He did not mention the word "tuberculosis" at all, did he? A He surely did.

30 Q Did you hear him testify here the other day? A I did.

Q Yes. Did you hear him say in the very spot where you are, that he told Gus Goldstein that she had a bad cold, but that there was nothing to be worried about? A Did I hear him say that?

Mr. Lane: I object to that on the ground the question counsel assumes that is all the doctor said. He said that and a lot more.

Marcus H. Greifinger, for Defendant, cross.

Mr. Unger: If there is anything more he can qualify it by his answer. This is cross examination.

The Court: I will allow the question.

Mr. Unger: I think I ought to have a little latitude. 10

The Witness: Will you repeat the question, please?

(Question read as follows: "Yes. Did you hear him say in the very spot where you are, that he told Gus Goldstein that she had a bad cold, but that there was nothing to be worried about?")

A I heard him say it here.

Q What is that? A I heard him say it on the stand, but I do not recall him saying it at the house. 20

Q I did not hear.

(Answer read as follows: "I heard him say it on the stand, but I do not recall him saying it at the house.")

Q Well, now, in May of 1928, when you were talking over wedding plans with your intended brother-in-law, I think you said something to Mr. Goldstein on that occasion about the affliction of your sister? A Yes, sir. 30

Q And what was it you said to him then?

A He asked me several questions, one of which was about their honeymoon plans, and I told him then that on account of her—on account of the fact that she was an arrested case of tuberculosis that I would not make any extensive plans, otherwise they would wear her out. 40

Marcus H. Greifinger, for Defendant, cross.

Q Which did you say to him? You testified before that he ought to realize that she was an arrested case of tuberculosis— A He ought to realize?

10 Q Yes. I am again quoting from your words, doctor. A I told him that he ought to take that into consideration.

Q You said that he ought to realize that she was an arrested case of tuberculosis; am I right? Did I quote you correctly that you testified to that, a few moments ago? A I don't know whether I used the word "realize." I told him that he ought to take that into consideration because he was told.

20 Q Well, now, upon the assumption that you did use the word that he had realized she was an arrested case of tuberculosis, what was there which, in your opinion, should have made him realize it— A The fact—

Q —at that time? A The fact that Dr. Ornstein told him on February 7th, previously.

Q And that was the only thing you had in mind when you spoke to him? A That was what?

30 Q That was the only thing you had in mind when you spoke to Gus Goldstein in May? A Well, I also had in mind telling him that—advising him that she should not have any children for two years.

40 Q Now, I am not speaking of that. I want to know whether when you told him that he ought to realize that she was an arrested case of tuberculosis your statement to him was predicated upon the fact that previously he had been informed to that effect by Dr. Ornstein? A Ornstein, yes.

Marcus H. Greifinger, for Defendant, cross.

Q And that is all you had in mind, is it, as to his previous knowledge on that? A That is the only definite time I recall.

Q You know of no other knowledge he acquired, do you? A We spoke of it several times offhand, but nothing as definite as that.

Q When did you speak of it several times offhand? A I can't recall. 10

Q You don't recall any specific instances? A No.

Q Well, when you spoke to him on that occasion that she was an arrested case of tuberculosis, did he make any inquiry, did he ask you anything or ask you how it happened? A No.

Q Did he question you on it at all? A No.

Q Said nothing to you? A Not to me. 20

Q No. You were—

The Court: Well, did he say it to anybody in your family, in your presence?

The Witness: Not in my presence.

Q No. Now, did you know as early as November of 1928 that your sister had this tubercular condition? A 1928?

Q Yes. A Yes. 30

Q Did you approve her going to the fraternity dance with her husband at that time? A 1928?

Q Yes. A I did not approve it.

Q You remember that she got up out of a sick bed, practically, to go to that fraternity on Thanksgiving Eve? A She had been up around the house several days, but she did not want to go.

Q She did not want to go to the Thanksgiving dance? A No. 40

Marcus H. Greifinger, for Defendant, cross.

Q And you don't recall that Mr. Goldstein asked your permission and asked if she was well enough to go? A I do recall.

Q Yes? A And I advised against it, but he would not listen.

10 Q And who would not listen? A Mr. Goldstein.

Q Did he force her to go to the dinner? A He insisted.

Q Took her out of a sick bed? A She was not in a sick bed—she was up and around several days at that time.

Q And the next day she was very much worse? A Yes, sir.

Q Yes. And from that time on her condition got worse, didn't it? A Yes, sir.

20 Q And do you recall that Mr. Goldstein was insisting that she consult outside physicians? A Yes, sir.

Q And you were opposed to that? A I was.

Q Yes, yet you were loath to treat her yourself, inasmuch as she was a member of the family? A I was loath, I did not like to, but I treated her.

Q And you, nevertheless, opposed him getting anybody else from outside for that purpose? A She had obtained medical attention.

30 Q Well, do you remember that he suggested she should have Dr. Fuerstman, in whom he had faith? A I had no faith in Dr. Fuerstman.

Q He was her husband, wasn't he? A He was her husband, yes.

Q And that matters nothing to you? A I was her brother and felt I knew more about the medical end of it than he.

40 Q Yes, but you were not attending her professionally, you said? A Oh, I took care of the minor things.

Marcus H. Greifinger, for Defendant, cross.

Q Minor things? A Yes, sir.

Q Did you consider this a minor thing? A No, I did not take care of her entirely. I had Dr. Ornstein.

Q But Dr. Ornstein was not attending her at that time? A At what time?

Q Thanksgiving, 1928? A He surely was. 10

Q Was she going over to his office? A 1928?

Q If that was the time? A Yes, sure.

Q She went to his office Thanksgiving, 1928?

A Thanksgiving?

Q Yes. A No, not Thanksgiving.

Q Well, about that time? A About that time.

Q You are sure about that? A Yes.

Q Don't you know it was not until the 19th of December, 1928, that he was brought in? A I think you have your dates mixed. The answer to your question is "No." 20

Q Have you got any record of when he attended her in December, 1928? A In December, 1928?

Q Yes. A In December, 1928, she went to his office. The second time—(interrupted).

Q When was it? A Some time during the month of December, 1928.

Q Did you bring him over to her when she was so afflicted in Newark here after this breakdown of Thanksgiving? A I don't recall in December. 30

Q Didn't bring him over, did you? A I don't recall.

Q So that from the time that she had this serious breakdown after Thanksgiving, 1928— A Yes.

Q —until the time when he was brought here, she was without medical attendance except insofar as you gave it to her? A She was going over to see Dr. Ornstein—(interrupted). 40

Marcus H. Greifinger, for Defendant, cross.

Q Never mind whether she was going over. I am asking you a question.

The Court: Well, you asked him if she was without medical attendance and he said she was going to Dr. Ornstein. That was
10 medical attendance.

The Witness: Almost every month.

Q "Almost every month" does not mean a single thing to me, doctor. I want to know whether between Thanksgiving, 1928, and the time when Dr. Ornstein saw her in December, 1928, any other doctor was attending her? A Between Thanksgiving and December?

Q Yes. December 19th? A I was the only
20 other doctor, I believe.

Q Yes. And it was during that period of time that her husband requested that Dr. Fuerstman be employed? A Yes, sir. I don't know whether it was that time, but I do recall that request.

Q Yes. Do you remember that a request was also made that Dr. Polevski examine her? A Yes.

Q And Dr. Polevski examined her? A Yes.

Q And you ridiculed his diagnosis? A I did
30 not ridicule his diagnosis.

Q You refused to do what he wanted to have done? A I did not refuse to do it.

Q What did he recommend? A What did he recommend?

Q Yes. A He recommended the same as Dr. Ornstein, she should have plenty of rest.

Q Yes. Now, you went up to Saranac Lake, as I understand it early in February or about—
40 you went up to Saranac prior to Washington's Birthday in February, 1929? A Yes, sir.

Marcus H. Greifinger, for Defendant, cross.

Q And that was after Dr. Ornstein had examined your sister in his office in New York? A After Dr. Ornstein examined her?

Q Yes. A I don't know whether it was in the office or in the home.

Q And you recall, don't you, that it was her husband's suggestion that she go to Saranac Lake? A It was Dr. Ornstein's advice. 10

Q Yes. He made no suggestion of that kind? A Who?

Q Her husband. A Not about Saranac Lake.

Q No. She went to Saranac Lake— A At Dr. Ornstein's advice.

Q Yes. You had not recommended that she go there? A I did not. Dr. Ornstein did.

Q No. I say you did not recommend that? A I don't recall that I did. Dr. Ornstein did. 20

Q Now, when you went to Saranac Lake you went to consult with Dr. Mayer and you found him away? A When I went to Saranac Lake, yes.

Q And you went then to Dr. Leetch? A In the same office.

Q And do you remember Mr. Goldstein telling you that he wanted to consult with Dr. Leetch and with you and that you beat him to it by talking to Dr. Leetch first? A No, sir. 30

Q Do you remember telling him that it was unethical for members of the family, relatives to consult to be on hand, to be present while professional people were talking about a case? A No, sir. He was in the office with us.

Q He was in the office with you? A Yes, sir.

Q You say now that you did not talk to Dr. Leetch ahead of him? A At the office, no, sir.

Q At any time? A When he came to the house I met him at the front door. 40

Marcus H. Greifinger, for Defendant, cross.

Q Yes. And you excused yourself to talk to him to some length before? A At what length and where before?

Q Before he talked with Mr. Goldstein? A We met Dr. Leetch at his office. Mr. Goldstein was there when I met him. Then the next time
10 we saw Dr. Leetch we made an appointment at her house. He was up—the three of us were upstairs, Mr. Goldstein, my sister and myself; when Dr. Leetch's car pulled up, I went downstairs to the front door to meet him.

Q And you say— A A thing I always do when I have consultation.

Q That is all right. You say now you did not discuss his wife's case with him before Mr. Goldstein did? A No.

20 Q All right. Now, you were present, were you, at the examination which Dr. Leetch was present and Mr. Plank, the X-ray man? A At Dr. Leetch's office?

Q Yes. A That was a different occasion. I was.

Q That was a couple of days later, about the 24th of February? A Yes, sir.

Q Yes. And do you remember at that time that Dr. Leetch and Mr. Plank pointed out to
30 Mr. Goldstein what the examination disclosed?

A They pointed out nothing to Mr. Goldstein.

Q They did not? A They were talking to me.

Q Well, he was there. A He was there.

Q He was there at the time and he heard it. A Probably did.

Q Yes. And do you remember him making the statement there on that occasion that was the first information he had that his wife had tuberculosis? A He did not.
40

Marcus H. Greifinger, for Defendant, cross.

Q He did not? A I don't remember him saying it.

Q You say you don't remember it? A Because he did not say it. He did not say it.

Q You have read the testimony of Dr. Leetch which he gave? A I just glanced through it. I don't remember any of it.

10

Q You say now, Mr. Goldstein did not make that statement? A He did not, that I recall.

Q Yes. And you remember there that on that occasion he accused you of having concealed his wives' condition? A He accused me of nothing.

Q You say he did not accuse you? A He did not accuse me.

Q And didn't he tell you that it was a shame the way her condition had been concealed? A He did not.

20

Q And didn't he tell you on that occasion, in your presence and in the presence of the others, that you were a disgrace to the profession for having concealed it? A I don't remember him arguing with me about any of that.

Q Not arguing with you. Didn't he make that charge there? A No, sir.

Q He did not? A No, sir, not in my presence.

30

Q And didn't you remain silent and refuse to say anything? A No; I would never remain silent.

Q Now, on this occasion when Dr. Ornstein came over to see your sister when she was so seriously ill, I think you said it was February of 1929. A Yes, sir.

Q And I understood you to say that he made a diagram or a sketch and exhibited it to Mr. Goldstein showing the condition of your sister.

40

Marcus H. Greifinger, for Defendant, cross.

A I think you have got the year wrong again. I will answer your question.

Q All right. Well, I don't care whether it is 1928 or 1929, it was the month of February that you are talking about? A February, 1928.

10 Q Yes. Well, that was before they were married? A Before they were married.

Q You recall the occasion, don't you? A I do recall the occasion.

Q Now, what was the nature of that sketch which he submitted? A I would have to say something that Mr. Goldstein was not present to account for all this.

20 Q I am asking you what kind of a sketch it was the doctor submitted. A He drew a sketch of the chest, showing the two lungs and how one lung was pushed over, and the heart and everything.

Q On a piece of paper? A On a piece of paper.

Q It was not an X-ray or anything? A No.

Q It was on a prescription pad? A That is right.

Q Marked up with letters, and pencil marks? A Correct.

30 Q As the doctor was about to leave? A Correct.

Q Yes. That is what you referred to as being the diagram? A That is right.

Q Yes. Now, you know where Mr. Goldstein went on his honeymoon, don't you? A Offhand, he went out West, that is all.

Q And you know all the places they went in New England? A No.

40 Q Canada? A I don't know—I know they traveled, that is all.

Marcus H. Greifinger, for Defendant, cross.

Q Yes. You had previously told him that he ought not make a very extended trip on account of your sister's condition? A I did.

Q Did you know beforehand where they were going? A No, I did not.

Q You didn't know anything at all? A Except that they were going to take a trip by train. 10

Q You didn't know any places they were going to? A I knew they were going out West, if that is "any places."

Q You knew they were going to Canada? A That they might stop at Canada, but they didn't tell me where they were going.

Q You made no objection to the trip? A I did object to it.

Q What? A I did object to it.

Q When did you make your objection? A 20
In May.

Q I mean after that. A After that they were on their trip.

Q Well, when were they married? A What is that?

Q When were they married? A In June.

Q Yes. Did you make any objection after the marriage of their going on that extended trip? A I told them that—

Q No. A I told Mr. Goldstein. 30

Q I am speaking now not of the occasion in May, but of the one in June? A No, I don't recall objecting after that.

The Court: Is that all?

Mr. Unger: Just one moment, your Honor please.

Q Doctor, do you remember the X-rays of Mrs. Goldstein that were taken at Saranac Lake 40

Marcus H. Greifinger, for Defendant, re-direct.

by Dr. Leetch? You know there were some taken? A No, I do not.

Q Well, you examined them when you were up there? A They were not taken by Dr. Leetch.

10 Q Well, his assistant—I beg your pardon, by Dr. Ornstein in New York? A Do I— Yes. Will you repeat that?

Q I will give you another question. Just strike it out. Do you recall the X-ray pictures that were taken of your sister by Dr. Ornstein in New York? A Do I recall them to speak of them?

Q Yes. A Offhand I am not an X-ray specialist.

20 Q And do you remember seeing them at Saranac Lake? A Some of them.

Q What became of them? A I don't know. I haven't the least idea.

Q You don't know where they disappeared to? A I do not.

Q They were taken by Dr. Ornstein? A I don't know who took them.

Q And have you taken it up with him to find out where they are? A I have asked him for them. He hasn't got them.

30 Q You don't know what became of them? A I don't know what became of them.

Mr. Unger: That is all, doctor.

Re-direct examination by Mr. Lane.

Q Who is Dr. Fuerstman? A Dr. Fuerstman is a relative of Mr. Goldstein's, that is all I know.

40 Q And who is Dr. Polevski? A Dr. Polevski is a doctor in town, a very able man, in charge

Regina Goldstein, for Defendant, direct.

of one of the medical research departments of Beth Israel Hospital.

Q Does he specialize in any particular branch? A Internal medicine only.

Mr. Lane: That is all.

The Court: Is that all the case? 10

Mr. Lane: Mrs. Goldstein.

REGINA GOLDSTEIN, sworn for defendant.

Direct examination by Mr. Lane.

Q Mrs. Goldstein, do you remember an occasion in February, at the time you had a cold, and Mr. Goldstein was calling upon you and as to what happened on that occasion? A I do. 20

Q Where were you? A I was in bed. I went to bed at the end of January; I left my position because I had a cold. I was working with the Board of Elections and I left my position because I did not feel well and got into bed. My brother examined me and he said I had a cold—

The Court: Now, wait a minute. Just answer Mr. Lane's questions. 30

Q How long before that had you known Mr. Goldstein? A I met him casually in the summer of 1927, did not go out with him until September 28, 1927. He came to the house and took me out.

Q And he called on you at this occasion in February? Now, tell us what happened? A Mr. Goldstein proposed to me Christmas. We were not officially engaged until February 4th. 40

Regina Goldstein, for Defendant, direct.

I got into bed the end of January, 1928. He had already chosen the stone that he was going to give me for my betrothal ring. At the end of January, when he came to the house he said, "Well, we are all ready to have the stone set," and I told him, "Well," I said, "I have got a cold now; I wish you would wait." I said I had had a tubercular breakdown five years ago and I always feared a relapse and I didn't want to make any official announcement until I was sure that this was just a cold and I was going to recover. I told him—then I told him about how I had contracted tuberculosis; I had been away at Brown University—

The Court: Well, now, don't go into that.

20 Q Tell us what you told him, that is all? A I told him that.

Q Did you tell him about Brown University? A I did.

Q Now, due to those statements that you made, what was his reply? A Well, he replied that he loved me and he would marry me if I had a wooden leg.

30 Q Now, do you remember an occasion a few weeks before you were married, after your husband had taken out a policy of life insurance with the Union Central Life Insurance Company naming you as the beneficiary, and do you remember whether or not he said to you, "Well, Reggie—" if that is what he called you? A Yes, that is my nickname.

Q "Well, Reggie, here is a clean bill of health and your boy friend is fit to marry," and you replied, "Well, so is your girl friend." Do you remember any such occasion as that taking place?

40 A Yes, I believe I do.

Regina Goldstein, for Defendant, direct.

Q Tell what happened. A About two weeks before I was married, at that time I told him that I had gone to Dr. Ornstein, and I had spoken to him about marriage. He said, "It is perfectly all right for you to get married." I asked him whether I could have children. He said, "Of course you can, but you must wait two or three years." I said, "Well—" I had explained that, I think—Mr. Goldstein knew that, my brother had explained that, but I just wanted to be sure that I could have children, and he said it was all right in two or three years. I told—I then told Mr. Goldstein that Dr. Ornstein said I was fit to marry; and I had also gone to another physician in Newark and I had asked him to give me a physical examination and I was going to be married in two weeks. He examined me and he took my blood pressure— (interrupted).

10

20

Q Never mind. Only what you told Mr. Goldstein? A Yes. I told this to Mr. Goldstein. I said that Dr. Jaso examined me and didn't even know that I had tuberculosis until I told him. I said, "Well, I told Dr. Jaso" and he laughed; he said, "Well, you would never know. You have no signs and you are passed—"

Q Was that the conversation that took place about the time of this Union Central Life Insurance policy? A That was in June when I was telling him that I had been examined by two physicians as to the condition of my health and whether I was fit to marry. I was very interested at the time.

30

Q Now, did you give your husband as a reason for your not desiring any other physician the fact that Dr. Ornstein was a very good friend of the family's, a good doctor, and his services

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Regina Goldstein, for Defendant, direct.

were available free? A I did not say that. I—
(interrupted).

Q Do you remember this Thanksgiving dance
that has been referred to? A I do.

10 Q How did you come to go to that dance? A
That was Mr. Goldstein's fraternity dance. I
was ill in bed and didn't want to go. I called up
his sister and asked her to go with Mr. Goldstein
to the dance as he wanted to go. She refused to
go and said that she did not feel she wanted to go.
I did not coax her, but I believe I spoke to her
mother about it, too, and her mother—(inter-
rupted).

20 Q Well, never mind that. Get down to what
you said to your husband. A He came home
that evening and I told him I had not been well
that day. I didn't feel like going and he told me
that this would be the first time he was missing
his fraternity dance and he had always enjoyed
the affairs immensely. I felt very badly about it
because I realized that—(interrupted).

Q Never mind. What did you say? A I told
him that I would go because he wanted to go.

Q Now, you remember your brother being
asked whether you could go or not? A Yes.

30 Q Do you remember what his reply was? A
He said he didn't think I ought to go.

Q Now, your husband in his testimony refers
to an occasion about a week or so after Thanks-
giving when he said you were in bed crying and
that he came in and talked to you and asked you
what you were crying about. Do you remember
such an occasion? A Yes. I cried very often
during that period.

40 Q Well, did you on that occasion or on any
other occasion say, "I should never have dragged
you into this. I should have told you before I

Regina Goldstein, for Defendant, direct.

married you that I was sick''? A No, sir; I never said that.

Q Did your husband suggest that you go to Dr. Fuerstman? A Yes, he used to mention Dr. Fuerstman's name frequently.

Q Did you refuse to be examined by him? A I believe I did. 10

Q Why? A Because, first, he is a family physician. I told Mr. Goldstein no one knew my case as Dr. Ornstein knew it, because he knew my past history and that I could not go to a family physician and have him treat me and in the second place, he was a member—a relative of his family; I did not care to have any relatives of his family examine me. I told him that I would go to any physician that he wanted outside of a member of his family. 20

Q Now, was Dr. Polevski suggested? A Yes, sir. 20

Q Did you object to being examined by Dr. Polevski? A I did not.

Q Were you, in fact, examined by Dr. Polevski? A I was.

Q Do you remember when that was? A I don't recall whether it was in November or December.

Q Of 1928? A Of 1928. 30

Q Do you remember after you were examined by Dr. Polevski having a talk with your husband or did this take place— A Why, yes, I told my—

The Court: No. Wait a minute.

Q Wait a minute until I finish. Did this take place, your husband asked you what Dr. Polevski said, and you said to him, "I must be terribly sick" or words to that effect? A No, I didn't 40

Regina Goldstein, for Defendant, direct.

say that, but I did tell him what Dr. Polevski told me.

Q Go ahead. What did he tell you? A Dr. Polevski—

Q What did you tell him, rather? A I told him that Dr. Polevski said that I had just—
 10 was running a small fever and I had not picked up the old trouble. He said it was a cold and I said—and I told him about my coughing, and I explained to Mr. Goldstein that Polevski said that this coughing was a condition of the chest that had to go on because I had a certain sputum in the base of the lung that had to be brought up, but he said there was no tuberculosis, and I told him that I had asked Dr. Polevski, “Shall I go to Saranac Lake” and he laughed at me and he
 20 said, “Not at all; stay home and stay in bed. You rest up the condition and you will be O. K.”

Q Now, do you remember after that, whether or not your husband stated to you that he was going to have another doctor examine you whether you liked it or not? A Oh, I don't recall any statement. He was perfectly satisfied with my explanation.

Q And do you remember that you asked him who the doctor was going to be and he said he wouldn't tell you, or did anything of that kind
 30 ever take place? A No, I don't recall that.

Q Now, do you remember after you were in Saranac your husband coming up to see you? A He came to see me twice. He came in February and he came in July.

Q I am now talking of the occasion that he came up to see you alone? A Yes, sir.

Q That was in July, was it not? A Yes, sir.

Q Will you tell me what took place between
 40 you on that occasion? A He came to see me, and when he entered the door, I was very glad to see

Regina Goldstein, for Defendant, direct.

him, because I could never believe that he had done such a thing, and I started to cry and I said, "Didn't I tell you that I had tuberculosis? How could you do such a thing?" And he said, "Don't cry. Put your head on my shoulder. Don't cry." And we started to talk and I said— (interrupted).

10

Mr. Unger: Are you looking at notes in your hand?

The Witness: Why, I have some dates here.

Mr. Unger: Please put them away.

The Witness: All right.

Q Go ahead. A I said, "Didn't I tell you that I had tuberculosis?" I said, "You brought this down on me." And I said, "How dare you give me such a shock? If you have no fears of the laws of man, have you no fears of the law of God?" So he said, "What is the matter?" I said if it was fated that I should live, I would live, and if it was fated that I should die, I would die. And he continued to talk on and on and discuss the case. At eight o'clock I was very tired and I asked him to go and he went. Before he left the room he said, "Do you know that this is constructive desertion? You are telling me to leave your bedroom." I said, "I don't care. I am tired." He left. At 9:30 that same evening he called up and asked the lady of the house whether I was up or whether I was sleeping. She said that I had retired right after he had left. He called up the following Sunday morning at eight o'clock and the woman who answered the phone said that I had not arisen yet, and he said, "Can I come to see her?" And she came to my

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Regina Goldstein, for Defendant, direct.

room and asked me and I said, "At ten thirty." He came at ten o'clock and we started to talk some more and he said, "Well," he said, "you know I loved you when I married you; I still love you and I will always love you. I want you to write home to your father and to your lawyer and
 10 tell them that, that I intend to withdraw the case because I love you," and he kissed my feet.

Q Go ahead. What else did he say? A What else? He asked me—he was surprised at my condition.

Q What did he say? A He said, "Well, I am surprised that you are so well; I thought you would be in bed with a night nurse and a day nurse." I said, "Yes; I fought hard to get well; I fought to get justice." I said, "That was the
 20 one thing that I saw in all this illness and the shock you gave me." So he said, "Well, I want my freedom, and that was the only way I could get it." I said, "Well, I want justice." He stayed until two o'clock, and then I told him we had rest hour from two to four. He was back promptly at four and stayed and had supper with me, until he left for the train. When he got down to the train the train had not arrived yet and he called me up and he said, "There are a
 30 few minutes yet before I leave. I want to be with you. If I cannot be with you personally I want to be with you in spirit." And he asked me what I was going to do and I said I was going right to bed. It was rather late and I was tired. He said, "Don't forget you are not to talk to any man while I am gone, while I am not there." I said, "You needn't worry; I can take care of myself." He called me up the following Saturday and asked me how I was. I said I was fine,
 40 progressing.

Regina Goldstein, for Defendant, direct.

Q Now, after this talk that you had with him at Saranac, did you ask him to come back the next day after the first day? A No, I did not.

Q When you told him, as you told him, that you had had tuberculosis, did he say that you had not told him and that if you had told him you would have given him an opportunity to decide for himself, or words to that effect? A No, sir. 10

Q Did you say that you wanted to tell him, but that—at the time you met him, but that you loved him very dearly and wanted to marry him and at the same time you wanted to tell him about the illness, but in words or to the effect, “You know how our Jewish folks are, a girl wants their home, they want to marry”? A No, sir.

Q “My folks told me that I should not tell you; they all urged me I should not tell you.” A No, sir. 20

Q Did you say that or words to that effect? A No, sir; I didn't say that.

Q Did the folks urge you not to tell him or anything of that kind? A No, my folks didn't tell him.

Q And did you say they were afraid if you told him he would not marry, and did you say you had more fights home, discussed the matter very often, and the conclusion was that you were not to tell Mr. Goldstein? A No, sir. 30

Q Was any such language as that used by you? A No, sir.

Q Was there anything said at that time about this suit being an annulment suit? A In July?

Q Yes. A Was there anything said about the suit?

Q Yes.

The Court: In Saranac?

Regina Goldstein, for Defendant, direct.

The Witness: Why, yes, I already knew I had been served with the papers.

The Court: Did he say anything to you about it?

10 The Witness: He told me who was representing him.

Q Well, did he say anything about the proof that would be needed in that suit, that kind of suit? A Oh, yes.

The Court: What did he say?

20 The Witness: He said that he was going to appeal to the mercy of the Court, that he was going to say that I could not have any children, that I was a financial burden, that he would become neurotic because I could not assume the responsibilities of a wife, that he would have to forego social life because I had to go to bed early; on those grounds he would appeal to the sympathy of the Court. I said to him, "Did you speak to my doctor about whether I can have children or not?" He said, "Yes, I did." I said, "What did Dr. Mayer state?" He said, "Dr. Mayer said you could have children in a few years." I said, "Did you speak to Dr. Mayer about whether I could live with you or not?" He said, "Yes, I did." I said, "What did he say?" He said, "Dr. Mayer said you could go home now if it were not summer time." He was just waiting for the hot spell to go over, but I had made an unusual recovery and had a very strong resistance to tuberculosis.

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Regina Goldstein, for Defendant, cross.

Q When was the last sexual intercourse between you and your husband? A In December, 1928.

Mr. Lane: Cross examine.

Cross examination by Mr. Unger.

10

Q Mrs. Goldstein, I understand you had your first attack of tuberculosis in 1923? A I did.

Q And your doctor was your brother at that time? A He discovered the disease.

Q And you had Dr. Ornstein at that time? A Yes; he took me to Dr. Ornstein for treatment.

Q And how soon after that was it that you went to Saranac Lake? A He—the disease was discovered in June after I had returned from Providence. Dr. Ornstein thought that I might take the cure and become well at home. I stayed home five or six weeks, but it was very hot and I told him that I was used to going out of the city in health, why should I stay in the city when I was sick. So he suggested that I go to Saranac.

20

Q You knew why people go to Saranac Lake? A For tuberculosis.

Q Yes. How long did you remain there? A I remained there over the winter. I went there in August and I stayed there over the winter.

30

Q You remained there not only in hot, but also in cold weather? A I did.

Q And you came back in what month? A I believe, in March.

Q That was in 1924? A '24.

Q Yes, and off and on from that time on you were a patient of Dr. Ornstein's I think you said, about every six months; you went to see him? A Yes, sir; I went for periodic examinations.

40

Regina Goldstein, for Defendant, cross.

Q And he kept on asking you to come back for examinations? A He didn't ask me to come back.

Q You felt that it was necessary to go? A I felt that I wanted to go to see—to take care of my health.

10 Q And you met Mr. Goldstein in the summer of '27? A I met him casually in the summer of 1927.

Q And you were engaged about Christmas time, 1927? A Yes, sir; he proposed to me at that time.

Q Yes. And when before Christmas, 1927, had you gone to see Dr. Ornstein last? A Before Christmas? I think I went during the summer or the June of that—of 1927.

20 Q And then during the latter part of the year did you go? A I don't think I went—I was working at that time.

Q Yes. And prior to the time that he was engaged to you—became engaged to you, not publicly but privately, in December, 1927, you had not mentioned anything to him about your having gone to Saranac Lake? A No, I did not.

Q Not even when he proposed to you at that time? A No, I don't think I told him.

30 Q No. Did it occur to you that he might want to know that at that time? A Did it occur to me that he might want to know?

Q Yes. A Well, I knew I was going to tell him before I married him. I had all—(interrupted).

Q Well, why were you going to tell him before you married him? A Because I thought it was a husband's place to know; I did not wish to misrepresent myself.

40 Q Yes. But were you going to let him announce his engagement first? A No, sir.

Regina Goldstein, for Defendant, cross.

Q When did you expect to tell him? A Before we announced our engagement.

Q Before you announced it? A Yes, sir.

Q And when did you announce it? A February 4, 1928.

Q Yes, and when did you tell him? A On or about February 1st. 10

Q 1928? A 1928.

Q Before you were engaged to him formally? A Yes, sir.

Q And what was the occasion when you told him? A The occasion was when he brought me the stone, when he had chosen the stone and was about to have it set.

Q And when was that? A When was that?

Q Yes. A That was when I was sick in bed.

Q Yes, but— A On or about February 1st. 20

Q February 1st? A Yes, sir.

Q So that it was not in January, it was February 1st. A I believe it was February 1st; it might have been January 31st.

Q And the engagement cards had already been printed, had they not? A I believe they had.

Q You had not told him prior to the printing of the engagement cards that you had been afflicted with tuberculosis, had you? A No, sir. 30

Q So that some time between the printing of the engagement cards and the formal announcement of the engagement you let him know? A I did.

Q Do you recall the date on which you got the engagement ring? A February 4th.

Q February 4th. And was it on that day that you told him of it? A February 4th? No.

Q When was it? A I told him February 1st.

Q Told him three days before? A Yes, sir. 40

Regina Goldstein, for Defendant, cross.

Q And why did you wait until three days before you got the ring to tell him? A Well, because there was a lapse of five and a half years and I had almost forgotten that I had tuberculosis, I had been so well from the time of my cure till that day that it was past history to me.

10 Q You felt there could be no possible recurrence of it? A Well, whenever I got a cold—when I got that cold the fear entered my heart and I felt there might be a possibility, but when I was well I never thought of it.

Q You had felt so well that you had not seen fit to disclose this to him from the time when you met him and were afterwards engaged to him, down to the—down to three days before the time when he presented you with an engagement ring; is that right? A Well, I knew I was going to tell him that I had tuberculosis.

20 Q Well, why did you postpone it until the evening of the engagement; why did you wait until three days before the ring was on you hand? A Well, I didn't think—we were getting married then and if I told him and he—

Q What is that? A We were not actually being married, I felt if I told him—(interrupted)

30 Q Any time before you were married? A Yes. He could still change his mind.

Q Yes. So that it made no difference to you whether you were engaged so long as you told him that some time before you were married? A Yes.

Q Didn't it occur to you that it would save a lot of trouble and heartaches for all of you if you told him that before you were engaged? A Well, I guess I didn't think about it.

40 Q Didn't think about it. It was one of those things that you didn't want to think about, wasn't it?

Regina Goldstein, for Defendant, cross.

The Court: Well, really, Mr. Unger, I can't see what this has to do with it.

Mr. Unger: Well, your Honor please, I want to respectfully differ with you.

The Court: All right. Go ahead and put it on the record, if you want to.

Mr. Unger: I never waste the Court's time, but this is a very important case for both of these people. 10

The Court: It seems to me you are wasting it now.

Mr. Unger: If I am wasting time I beg the Court's pardon, but I did not interrupt the very lengthy cross examination of my own client; it took one hour and a half.

The Court: All right. I want you to have all the— 20

Mr. Unger: Will you read the last question of Mrs. Goldstein?

(Question read as follows: "Didn't think about it. It was one of those things that you didn't want to think about, wasn't it?")

The Court: What is your answer to that, Mrs. Goldstein?

The Witness: Why, I certainly—if I felt that I was going to go through all this—I never dreamed of anything like this. 30

Q All right. Now, come down to the first day of February—you say that was the day—and tell us again just what you said to him and how you led up to the conversation. A He said he was going to have the ring set—he had already chosen the stone—and I said, "Wait before we make any official announcement or before you give me the ring." I said, "I have a cold now. My brother 40

Regina Goldstein, for Defendant, cross.

says it is just a cold, but I had a tubercular breakdown five and a half years ago and it takes—in the first place, it takes me longer to get rid of a cold than it does a normal person; and, in the second place, you never can tell whether a cold will turn out to be a relapse of the tubercular condition. I want to be sure.” I asked him to wait.

Q Wait for what? A Before he set the stone and before we sent out the cards of our official engagement.

Q This was on the 4th of February? A Yes, sir.

Mr. Clancy: The first.

The Witness: The first of February.

20

Q The first of February? Is that all you said to him about your condition on that occasion? A About my—at that time present condition or about my previous condition?

Q No—yes, about your previous condition. A I told him how I had contracted tuberculosis and when it was discovered and how many years had elapsed since my tuberculosis—cure—since I had taken the cure and the present time. I also told him that I had never had a cold from that time until that present time.

30

Q Did you tell him anything else on that occasion? A Well, I don't recall whether I did. I just fully explained the condition, that is all.

Q You gave him to understand fully what the matter had been with you? A Yes, that I had had tuberculosis; my brother said that that was just a cold and—

Q You wanted him to know everything that had ailed you? A Well, I wanted him to know my past.

40

Regina Goldstein, for Defendant, cross.

Q Yes. Did you tell him that you had been to Saranac Lake— A Yes. I told him that I had.

Q You did not recall that when your lawyer asked you or when I asked you a moment ago, did you? A When you asked me what?

Q If you told everything. A Well, I told him everything that I thought he should know. 10

Q Did you tell him you were up at Saranac Lake? A Yes, I told him that I had left my home.

Q Did you tell him where you went? A Yes, to Saranac Lake in the Adirondacks.

Q You recall that now, do you? A Yes, sir.

Q You are sure you told it to him? A I am sure.

Q Did you tell him you were going to Dr. Ornstein on an average of about six months apart? A Yes, I told him that. 20

Q Now, is there anything else that you told him that I have not reminded you about? A Well, I don't recall what else I might have said that evening.

Q Did you tell him that you had X-ray plates taken of your chest? A That I had X-rays?

Q Yes. A Why, everybody has X-rays who has chest trouble. 30

Q Did you tell him that? A I don't think—I don't recall whether I told him I had X-rays, no.

Q Did you tell him Dr. Ornstein made X-ray plates of your chest? A No, I don't think I told him that.

Q And he said then he did not care what was the matter with you, he would marry you if you had a wooden leg? A Yes.

Q And was that the only occasion prior to your marriage that you told him about your past 40

Regina Goldstein, for Defendant, cross.

inssofar as your lungs were concerned? A That was the only time when I had a specific discussion of him—of it.

Q You had never mentioned it before that time, of course? A No, sir.

10 Q And down to the time when he was married to you, you did not refer to it again? A I only told him that I went to Dr. Ornstein and I went to Dr. Jaso.

Q On that occasion in February— A No, that was after.

Q That was before you were married? A Before I was married, yes.

Q Now you were married in June, was it, of 1928? A I was.

20 Q Yes. And you were in good health at that time? A I was.

Q And you took rather a strenuous honeymoon up in the northern part of the country? A I didn't find it strenuous. I came home, I was—I had gained five or six pounds and I was in the pink of health.

Q Yes. So that nothing occurred on the honeymoon that made you feel any worse? A No, sir.

30 Q No. And in September you were living in your mother's home, were you? A I was.

Q That is when you were taken sick then? A No; it was in October.

Q And you got so bad that you had to go to bed in Thanksgiving Day? A Yes, whenever I have a cold I go to bed.

Q And do you recall the time while you were in bed you were crying? A Very often after that I cried.

40 Q What were you crying about? A Because my husband used to taunt me.

Regina Goldstein, for Defendant, cross.

Q Now, what did he taunt you about? A He was very dissatisfied and said, "Any man that marries a girl without lots of money is a darn fool," he used to taunt me on that score and then he used to talk about divorce. He made a study of divorce even in all the countries of Europe and in America and he used to compare them and say how he believed in the divorce laws of Russia. 10

Q Well, what was there in you that he was dissatisfied about? A I don't know. I think— (interrupted).

Q Did he make any personal complaint against you? A Well, he used to say those things and I was sensitive. I was ill at the time and felt very badly about it.

Q Well, what was there about you that he was dissatisfied with? A What was there about me? 20

Q Yes. A He had—he was bothering me for money to pay for his stock losses and I told him I couldn't give it to him, because I had to pay for furniture and he had invested some of my money and I—

Q In your name? A In my name.

Q You had not given him any money? A No. 30

Q He had not asked or demanded any money from your folks before he married you? A Not before he married me.

Q Or afterwards? A He demanded at that time in October and November he asked me for money.

Q How much? A Why, I don't know how much; he asked me.

Q He gave you liberal allowances? A He gave me twenty-five dollars a week. 40

Regina Goldstein, for Defendant, cross.

Q How much? A Twenty-five dollars a week.

Q Do you know how much money you got from him in checks from the time you were married? A Twenty-five dollars a week.

Q And you were living home at that time? A I was living home; yes, sir.

10 Q And you got a \$1,500 diamond ring presented you? A I don't know what it cost; it was a very nice ring.

Q And spent a couple of thousand dollars on your honeymoon? A My money; wedding gift, he had taken it all.

Q You gave him money? A Yes; I showed him the gifts we had received on my wedding day, and took the check from my hand and gave it to his brother to deposit in his name. That covered the honeymoon.

20 Q I suppose those wedding gifts were for both of you? A On my side of the family.

Q Well, we will try not to get into any family trouble.

The Court: I think this is very interesting. I do not think you are wasting the time of the Court now. I take it you were in love with him at that time?

30 The Witness: Very much so.

Q And he appeared to be in love with you? A He did.

Q And you observed no change in his love towards you? A I did.

Q When did you observe the change? A When did I observe the change? In September.

Q That is the time you were taken ill? A At the end of the month.

40 Q Yes. And what was there on his part that indicated that he had changed his feelings

Regina Goldstein, for Defendant, cross.

towards you? A Whenever we went out in the presence of any of his male friends he said to the boys, "Don't marry unless you get money." I used to feel very badly about it and I told him the next time he said it I was going to say something in the presence of his friends. I asked him what he insinuated, that he was disappointed that he did not get money or was he trying to show off to his friends that he got money? 10

Q Well, he did not try to refrain from taking you out, did he? He continued to take you out?

A Yes.

Q In fact, you say he insisted that you go out with him on Thanksgiving? A He did.

Q And that is when you were sick, as you say? A Yes, sir. 20

Q Yes. Now, during this time did Dr. Ornstein come to visit you? A During what time?

Q November, 1928. A No, sir; I went to see Dr. Ornstein.

Q And you were in bed, weren't you? A Yes, I was resting, but I was able to go out; I was going out; I visited his brother in Asbury Park on November 18th. I went to visit certain friends of his in the month of November.

Q I am speaking of after Thanksgiving? A After Thanksgiving? 30

Q When you were taken down and went to bed, as I understand it? A What did you ask me?

Q Did you see Dr. Ornstein after Thanksgiving, 1928? A Yes, sir.

Q And did he come to your home? A In January.

Q Now, between Thanksgiving, 1928, and January, 1929, did he come to your home? A In January, not before. 40

Regina Goldstein, for Defendant, cross.

Q No? A No.

Q Did you have any medical attendance other than your brother during that period? A I was going to Dr. Ornstein; he told me what to do.

10 Q You went to see him in New York? A I did. I took Mr. Goldstein with me on one occasion. I insisted that he go.

Q And when was that? A November 12th.

Q Why didn't you want Dr. Fuerstman to examine you? A I told you that before.

Q Because he was in the family? A And, secondly, he was a family physician.

20 Q Well, your husband was solicitous enough to want another doctor to examine you; why didn't you acquiesce in that? A Because I told him no family physician could treat my chest condition.

Q Well, you did not seem to be getting any better, did you? A Well, doctors can't make me better. You have to take time. No doctor can make me better.

Q It appeared to him, did it not, that you were getting worse all the time? A After November 27th I did get worse.

30 Q You made no change in doctors? A No, sir.

Q And how did you happen to go to Lakewood? A At the end of October I went to Lakewood. I went to Dr. Ornstein in the beginning—

Q Yes. A —during the month of October and I told him that I was resting in bed. He examined my chest and he said, "There is no tubercular condition there; you have a cold."

Q That was when? A In October.

40 Q 1928? A 1928.

Regina Goldstein, for Defendant, cross.

Q And Dr. Ornstein told you you had no tubercular condition at that time? A No. There was no sign of a relapse.

Q Well, how did you happen to go to Lakewood? A He told me to go when he suggested that I get away.

Q Didn't your husband ask you to go to Lakewood? A I came home and told him what Dr. Ornstein said.

Q How long were you there? A One week.

Q In your interrogatories you say you were there a month? A One week I was there.

Mr. Clancy: That is my error.

Mr. Unger: All right.

Q You were there one week and your husband took you to Dr. Ornstein in New York? A Yes, sir.

Q In December or January— A November.

Q November? A Yes, sir.

Q And was that the occasion on which it was decided you would go to Saranac Lake? A No, sir.

Q When was that decided? A That was decided in January.

Q Yes. Who decided that? A Dr. Ornstein.

Q And didn't your husband make the suggestion in his presence— A Absolutely not.

Q —that you be taken to Saranac Lake? Were you there? A I was there when Dr. Ornstein told me to go to Saranac Lake.

Q You don't know that your husband made that suggestion yourself? A No, I don't recall that.

Regina Goldstein, for Defendant, cross.

Q You don't know whether or not he did? A No, sir.

Q No. Now, while you were in bed there and you say you cried, isn't it true that he came into the bed and put his face alongside of yours and asked you why you were crying and you told him you never should have dragged him into this? A No, sir. I felt very badly that I was ill. I said I was sorry that I had married; if I had known I was going to be ill I would never have married because it made conditions very bad.

Q You had told him before you had married that you had a breakdown? A I did.

Q And you reminded him of this statement when you were in bed with him at this time, didn't you? A Remind him of what statement?

Q That you had told him that you had had a breakdown before? A Why, yes; he knew it.

Q Yes. You didn't tell him that you had had a tubercular breakdown, did you? A Why, of course I did.

Q Those were the words you used? A I had had tuberculosis.

Q You didn't say that before you had tuberculosis. A Why, of course, I told him I had tubercululosis.

Q But you didn't say that. You said you told him that you had a tubercular breakdown five years ago. A Well, that is the same thing, isn't it?

Q Well, is it to you? A Yes, sir.

Q Well, then, suppose you tell us what you told him. Did you tell him you had a tubercular breakdown or that you had tuberculosis? A I had had a tubercular breakdown, I guess, I don't recall the exact words I used. I gave him what I understand I had.

Regina Goldstein, for Defendant, cross.

Q A breakdown, wasn't it? A Tubercular breakdown, a tuberculosis of the lung and I had taken the cure at Saranac.

Q You did not use the word "tubercular" at all, did you? A I used the word either "tubercular" breakdown or "tuberculosis".

Q You don't remember which? A Why, no, I do not. 10

Q And you don't remember if you used either? A Why, I certainly do.

Q Well, he came up to see you in February of 1929 this year? A Yes, sir.

Q And on that occasion you were examined by Dr. Leetch, I think; is that right— A February, yes—

Q You were on perfectly good terms with your husband, weren't you? A Yes. 20

Q You were still in love with him? A Yes.

Q And you wrote him very endearing letters? A Yes.

Q And he sent you the money to pay your hospital attendance or sanatorium care up there? A Yes.

Q Paid for your doctors? A Yes, sir.

Q And he had not in any way proved deficient up to that time, had he? A No, sir. 30

Q You were counting the days when you were going to come back? A I was.

Q Now, were you present on the occasion when— You must have been present, of course, but do you remember the occasion when you were being examined by Dr. Leetch in the presence of Mr. Plank—no, you were being examined by Dr. Leetch, and your husband was there? A Yes.

Q And your brother? A Yes. 40

Regina Goldstein, for Defendant, cross.

Q And do you remember what your husband said on that occasion? A No.

Q Tell us what happened on that occasion. You have not said anything about it. A Why, Dr. Leetch examined me. He said that I had a dry chest and very good scar tissue from my previous breakdown. He said my lung was in very good condition.

Q Yes? A And he was—he had no doubt I was going to be well. It was just a matter of time.

Q Was your brother there at that time? A Yes.

Q You were not present, were you, when your brother—when your husband accused your brother of concealment? A No.

20 Q And that was not done in your presence, was it? A No.

Q Well, anyway, when your husband left you on that occasion which was in February, 1929, you and he were still on good terms? A Yes, sir.

Q And you knew nothing of his intentions until you had received papers in this case which, I think, was in March, 1929? A March, yes, sir.

30 Q Now, he came up to see you in July; is that right? A Yes, sir.

Q And he had been there three days, had he not, before he came to see you? A I believe he had, yes.

Q And your doctor was Dr. Leetch at that time? A Mayer.

Q Mayer. And do you know that he arranged with Dr. Mayer to see you? A Yes, I believe he did tell Dr. Mayer he was coming over to see me.

40

Regina Goldstein, for Defendant, cross.

Q So that you knew before he came that he was expected? A I knew before he came that he was coming, yes.

Q Yes. And, of course, at this time the papers in this case had already been served upon you? A Yes, sir.

Q You greeted him, as I understand it, affectionately? A I was very glad to see him. 10

Q And you told him that you never would have forgiven him if he had not come to see you while he was in Saranac Lake? A I said, yes, I would have been greatly surprised if he had not come to see me.

Q Yes. So it was entirely to your liking that he did come to see you? A Yes, sir.

Q And then he said that he loved you yet? A Yes, sir. 20

Q And he intended to withdraw the case? A Yes, sir.

Q And he kissed your feet? A Yes, sir.

Q And then he said he wanted his freedom? A Yes, sir; he was very illogical. I accused him—(interrupted).

Q Did he say all those things on that one occasion? A No, sir.

Q Well, when— A During the course of the day. 30

Q I mean, on that day? A On that day.

Q In the same conversation, on the same day, he not alone told you that he loved you and wanted to withdraw his case, but that he wanted his freedom from you, is that right? A On the same day he told me that.

Mr. Unger: That is all.

Regina Goldstein, for Deft., re-direct—re-cross.

Re-direct examination by Mr. Lane.

Q Did you say anything to him about its being illogical at the time? A I did.

Q What did you say? A I said, "You are more illogical than a woman."

10 Q What was his response to that? A He laughed.

Re-cross examination by Mr. Unger.

Q Then, after he told you that he wanted his freedom and gave you these manifestations of his love, he still called you up from the train? A He did.

20 Q And repeated what he had told you in an affectionate way? A He did.

Q Did you understand from him, when he left you, or after he left you, that he was going to proceed with his case or withdraw his case? A I was not sure what he was going to do. When he left me and he kissed me goodbye, he said, "Well,"—I said, "I am coming home in September." He said, "Well, I don't know whether—how things are going to turn out. The next month will decide." I said, "It is entirely
30 in your hands; do as you please."

Q You and he fought out this proposition? A Yes, sir.

Q (Continuing.) Pretty much before he left, didn't you? A Yes, sir.

Q And he did say to you that you did not give him the opportunity of deciding whether or not he wanted to marry you? A He did not say that.

40 Q He asked you why you had not told him about this before? A No, sir.

Regina Goldstein, for Deft., re-direct—re-cross.

Q Didn't you say to him—(interrupted) A He admitted that I told him.

Q He admitted that you told him you had had a breakdown—did he not? A Tuberculosis, a tubercular breakdown.

Q You were insisting that you had told him that? A Yes, sir. They are equivalent in my estimation. 10

Q You mean, tuberculosis breakdown and breakdown are equivalent? A No. A tubercular breakdown and tuberculosis.

Q And you were insisting that you had used that expression to him? A Yes, sir.

Q And he insisted that you had not? A No, he did not insist that.

Q He admitted it, did he? A Yes, sir.

Q Yes. Well, did you tell him that you loved him when you married him and loved him very dearly? A I did. 20

Q Did you also tell him that you loved him so dearly that you would not give him up? A At what occasion are you referring to?

Q I am referring to the occasion when he was talking to you in July, 1929? A I said I would not give him the annulment. I would fight—that is—I said that was what I was living for, to fight this case and justice. 30

Q Maybe I did not make myself clear.

The Court: Did he ask you to make any defense to this case?

The Witness: Did he ask me to make any defense? He knew I was making a defense.

The Court: Well, did he ask you to withdraw the defense?

The Witness: No, he didn't ask me to withdraw. He—(interrupted). 40

Regina Goldstein, for Deft., re-direct—re-cross.

Q Didn't you tell him at that time that you had loved him so very much that you had been of the mind to tell him of your illness, but that you had been persuaded against it? A But I did tell him of my illness.

10 Q I am speaking now—I am asking you now whether you did not tell him on this occasion?
A I did not tell him that.

Q Did you tell him that, that your folks had wanted you to marry and that you had had discussions and quarrels in the home about it, but finally decided that you were not to tell him and that you did not tell him? A Because I didn't have such—

20 Q Did you have such quarrels or such discussions in your home as to whether you would tell him or not? A No, sir; everybody knew I told him.

Q Everybody knew you told him? Well, who was present when you told him? A No one was in the room when I told him.

Q So that the only information they could get would be that which you would give them about it? A Yes, sir.

Mr. Unger: That is all.

30 Mr. Lane: That is all; that is the case.

Mr. Unger: Now, I have just a very little bit in rebuttal. Not having the testimony before me—

The Court: Then what do you want to do afterwards? Do you want to argue it orally?

Mr. Unger: Why I—

Mr. Lane: I would like to argue it orally. I am prepared to argue it. It won't take five minutes.

40

Deposition of Dr. Henry Leetch.

The Court: All right. I will adjourn until two o'clock or thereabouts.

Mr. Unger: Your Honor wants to adjourn now?

The Court: Yes.

Mr. Unger: I have a little bit of rebuttal.

The Court: All right, you can rebut. 10

Mr. Unger: I would prefer to rebut it at two o'clock so I can go over some of the testimony here.

RECESS.

Mr. Unger: I would like to offer in evidence a part of the deposition of Dr. Leetch which was objected to before and ruled out by your Honor. I now offer it upon the ground that it is rebuttal. 20

Mr. Lane: Page?

Mr. Unger: Page 30. On the ground that it is competent in view of the testimony given by Dr. Greifinger. It commences about the middle of the page on page 30 with the question: "Do you know whether or not anything happened on that occasion to indicate whether Mr. Goldstein, the petitioner had ever been informed of the condition of his wife?" 30

The Court: Well, read it and let us see.

Mr. Unger: Question—

Mr. Lane: I won't object to it although my recollection—(interrupted).

The Court: All right.

Mr. Lane: I think I will object to it. I think those questions were brought out from Dr. Greifinger on cross examination.

Deposition of Dr. Henry Leetch.

Mr. Unger: Yes, they were brought out and he denied them and they are now competent. It is now competent to offer this in rebuttal.

Mr. Lane: You cannot—

The Court: Let me hear what it is.

10 Mr. Unger: I suppose I will have to tell your Honor the case. It was while the defendant was being examined at Saranac Lake by Dr. Leetch in the presence of Dr. Greifinger and her husband, Mr. Goldstein, and this is the question asked of Dr. Leetch, the examining physician: "Do you know whether or not anything happened on that occasion to indicate whether Mr. Goldstein, the petitioner, had ever been informed of the condition of his wife?"

The Court: On what occasion?

20 Mr. Unger: In February, 1929. And the answer is: "Mr. Goldstein expressed extreme surprise to me and Dr. Greifinger that Mrs. Goldstein had tuberculosis."

The next question is: "Do you recall in what manner he expressed surprise? What did he say?" And the answer is: "He obviously—I don't recall his exact words, but he expressed considerable anger at Dr. Greifinger." Question: "What was Dr. Greifinger's reaction in respect to his expression of anger?" Answer: "Very little." Question: "Did he make any explanation of the seeming lack of knowledge on the part of Goldstein, as Goldstein expressed it?" Answer: "No." Question: "Did he say anything in contradiction of Goldstein's statement that he had not been apprised before that time?" Answer: "I don't recall." Question: "You mean you don't recall that he said anything?" Answer: "Yes." Question: "And there is
30 nothing that you recall that he did say?" An-
40

Deposition of Dr. Henry Leetch.

swer: "No." My general impressions of the whole conference was that Mr. Goldstein was doing most of the talking."

I want that part of the evidence in.

The Court: Any objection?

Mr. Lane: Yes. I object on the ground that it is not rebuttal. I asked the doctor—the only theory on which it could possibly be introduced is a contradiction of Dr. Greifinger's testimony. On my direct examination I did not ask Dr. Greifinger one single word with respect to that conference. On the cross examination Mr. Unger went into that conference and he found by the statement made by Dr. Greifinger, under the rule, he cannot cross examine and make testimony for the purpose of rebutting it, by proving that the witness testified falsely to a matter which is immaterial or to a matter which is beside the issue. 10 20

Mr. Unger: Mr. Lane is wrong about that. I am entitled to the benefit of whatever discovery I get out of his witness and if that discovery I get from his witness is in contradiction of something I want to prove, I can rebut the facts.

Mr. Lane: That is the first time I ever heard of that. Counsel is entitled to the discovery from witnesses of the other side. He is entitled to cross examine on the subject matter of the direct and nothing more. If he goes further, he makes the witness his own witness. 30

Mr. Unger: The purpose of the cross examination is to obtain, if you can, discovery from the witness on the other side. I get that discovery by Dr. Greifinger denying the facts which I hereby rebut.

The Court: I will allow it.

Mr. Lane: I do not understand that. 40

Gustave L. Goldstein, In Rebuttal, direct.

GUSTAVE L. GOLDSTEIN, recalled in rebuttal.

Direct examination by Mr. Unger.

10 Q Mr. Goldstein, did Dr. Greifinger, in May of 1928, tell you while you were discussing plans for your honeymoon with his sister, that you had to realize that she was an arrested case of tuberculosis and must not take an extended wedding trip? A He never told me anything of the kind. He never mentioned to me that she had tuberculosis in all the time that I knew her, nor did he ever mention anything about any tubercular condition. The first information I received—(interrupted).

20 Mr. Lane: I object if the Court please. The question has been answered.

Q Did he at any time prior to your engagement or prior to your marriage in June, 1928, tell you that she had a tubercular or tuberculous condition, arrested or not arrested? A Absolutely not.

30 Q Did he in May, 1928, tell you that he did not think it advisable that you should have children on account of that for two or three years and did you acquiesce with what he said? A Absolutely I did not.

The Court: Well, now— Go on.

40 Q Did you insist upon your wife going to the fraternity dance—dinner and dance in November, 1928, over your wife's objection and insist that she go when your sister refused to go? A No, sir; she wanted to go to the dance.

Gustave L. Goldstein, In Rebuttal, direct.

Mr. Lane: I object to that. The answer is "No." He has already testified to his side of the story.

The Court: The answer is "No"; that is all.

Q Did you on the occasion of your visit to your wife in July, 1929, after this suit was brought, tell her that you intended to withdraw the case? A No, sir. 10

Q Did you on that occasion kiss her feet? A No, sir.

Q Did you tell her that you loved her yet? A No, sir.

Q Did you tell her that you would withdraw your case? A Absolutely not.

Q Did you tell her that you wanted your freedom from her— A No, sir. 20

Q —on the same day?

The Court: Well, what did you tell her?

The Witness: I didn't tell her anything of the kind. I simply told her that I was going ahead with this annulment action and I would see it through to a finish.

Q You have already testified in your main examination as to what you did tell her on that occasion. A Yes, sir. 30

The Court: Did you call her up from the station on the telephone?

Mr. Unger: I am coming to that if your Honor will bear with me a moment.

The Court: Surely. I beg your pardon.

Mr. Unger: I do not mind the Court's interruption, if you want to ask about it.

The Court: No. 40

Gustave L. Goldstein, In Rebuttal, direct.

Q Did you, after you left her, telephone to her from the station, before the train left, and express to her your love and tell her not to be talking to any other man while you were gone?

A No, sir; I phoned her from the railroad station. I had about an hour's wait for a train.
 10 The trains were running in several sections that day because of the holiday—that is, because of the summer rush. I simply spoke to her for a few minutes and told her goodbye.

Q Did you on the occasion of your second visit there on Saturday tell her that you would proceed with your case and appeal to the mercy of the Court? A No, sir.

Q Or words to that effect or anything like that? A No, sir.

20 Q Did you tell her that you would indicate to the Court that to be married to her would mean that you would have to forego social life— A No, sir.

Q —or things like that? Did you during the time you were married to your wife attempt to borrow money of her or harass her with requests for moneys? A Never.

30 Q Did you during the same period of time force her to listen to you while you read books on divorce in other lands and so forth? A No, sir.

Q Did you, during that time express to her your preference of social conditions as they existed in Russia? A No, sir.

Q With respect to the moneys that she received from you during the time you were married, did she have a regular allowance? A Why, yes.

40 Q How much was it? A I gave her approximately two hundred dollars a month.

Gustave L. Goldstein, In Rebuttal, direct.

Q And that kept up while you were married down to the time she went away? A Yes, sir.

Q Yes. Were you ever attempting to get money from her to recoup financial losses? A No, sir.

Q You were in the law business? A Yes, sir.

10

Q Did you have a paying practice? A Yes, sir.

Q How much did you make in 1929? A I filed an income tax return for the year—1929 or—

Q 1928 and 1929—1928 A 1928 I filed an income tax return showing a net taxable income of \$7,500.

Q Is that after taking off deductions? A That is after taking off all deductions.

20

Q Now, was that true? A Absolutely, sir.

Q Did you ever take away from her moneys which she had received as wedding presents? A No, sir. What happened was this—

The Court: Now—

Q Well, was there any money transaction at the time of your wedding? A There was no money transaction, no.

30

Q Did you ever ask or demand that you receive any money from her before marrying her?

A No, sir.

Q Or from her folks? A No, sir.

Q Or after marrying her? A Never.

Q Did that ever enter into it? A Never.

Mr. Unger: That is all.

40

Gustave L. Goldstein, In Rebuttal, cross.

Cross examination by Mr. Lane.

Q Did you use money which was given to you as a wedding present to pay for the expenses of the trip on the honeymoon? A I don't know whether you would call it a particular applica-
10 tion—(interrupted).

The Court: No. Mr. Lane, I couldn't hear that.

(Question read as follows: "Did you use money which was given to you as a wedding present to pay for the expenses of the trip on the honeymoon?")

A No, sir. I don't know how I applied the
20 money. I did not apply it specifically for that purpose, but I don't mean to say—when I planned the honeymoon I planned it on my own resources, my own ability to pay for it. I didn't know until the day I was married that I was getting any money at all. On that day her father gave me a check for \$500.

Q Is that all that you got in the way of money wedding presents? A Her brother gave me a
30 present of \$200. My own brother gave me a present of \$200. I believe that is all the cash I received from anyone, whether her relatives or my own, from the time I met her up until the time I separated from her.

Mr. Lane: That is all.

Mr. Unger: Now, I want to ask whether or
40 not this is a case where you ought to have the opportunity of going over this testimony. There was testimony taken here a month ago—

Colloquy.

The Court: I remember all the testimony, Mr. Unger. I am thoroughly familiar with it.

Mr. Unger: I feel—

The Court: It has been gone over and over and over.

Mr. Unger: Well, it is—

10

The Court: I can recollect it.

Mr. Unger: Well, I just wanted—

The Court: I want an oral summing up.

Mr. Unger: I say, I just want to say to your Honor what is in my mind and that is that I think the case is of sufficient importance for your Honor to read the testimony and have pointed out to you with particular clarity what I consider to be very important statements on the part of the different witnesses, especially those witnesses who were here a month ago.

20

The Court: The testimony a month ago has been written up and I read it.

Mr. Unger: Your Honor has read it? Do I understand your Honor doesn't want to have any written memorandum on it, does not want to receive a brief on it?

The Court: Of course, I cannot—

Mr. Unger: I think it is very important to either side, no matter which way it happens. I think it is one of the cases—(interrupted).

30

The Court: It is merely a question of facts.

Mr. Unger: Yes, it is merely a question of facts where your Honor might well pause to take a little more time to consider it and have the testimony written out; the testimony as well today as that taken before, and have it called to your attention.

The Court: Yes.

40

Colloquy.

Mr. Unger: And have a brief. It seems to me it is of sufficient importance for each side to do that, and if we can argue it now, of course we have got to depend on testimony picked at random and trust to luck to find out what is best for us and it is my desire, in deference to the interests of my client. If your Honor takes that course, you will do it—

Mr. Lane: I object, if the Court please. This case is a pure question of fact, like every other case of fact, it seems to me that the Court is in better position to decide the case at the conclusion of the testimony, at the conclusion of whatever oral argument may be given, than it would be at any other time.

It is not an involved question of law at all. The law is settled; the burden is on the petitioner, as the petitioner well knows, to prove the fact.

I am ready to argue whatever argument I shall indulge in now.

The Court: I feel, Mr. Unger, that I am just as well capable of rendering a decision now, as I would be by having read over this testimony which I have received today, because I have read over the other testimony and I am thoroughly familiar with it.

The only question in this case is, did this man know when he married this woman, or before he married her, that she had tuberculosis. Now, that is a pure question of fact, and after argument, I think I can decide it now, and I think that is what I am going to do. Memorandums on your side will be nothing but a rehash of the fact.

Now, I will give you every opportunity to argue on the facts as they appear. I think we ought to finish this thing up today.

Argument for Defendant.

Now, I will hear oral argument, if you so desire.

Mr. Unger: I suppose the defendant argues first?

Mr. Lane: I have no objection. Mr. Unger suggests that the defendant argues first. I have no objection and will content myself with two or three minutes. 10

The law in cases of this kind is settled by Vice-Chancellor Backes in the case of *Buechler v. Simon*, where I happened to be opposed to Mr. Unger and where Mr. Unger was successful. The Court said in the Court's opinion: "To annul a marriage contract on the ground of fraud, where a spouse at marriage suffers from a latent nervous malady which predisposes her to nervous breakdowns and insanity during attacks, and as a result of which she had been previously committed to an insane asylum, it must be established that she deceitfully concealed her condition." 20

And there are several other cases which hold that there must be corroboration of defendant's story. Mr. Goldstein is the only witness who has testified here that he did not know his wife's condition at the time of the marriage. There is not a scintilla of corroboration, and, even had any testimony been put in by the defendant, I submit 30 the petitioner must have failed in this case, he could not have recovered even had he been before a Special Master in an undefended case. His conduct itself is inconsistent with his claim of lack of knowledge. His continuing with his wife under the circumstances of this case, when he knew she was as ill as she was, and after he had himself sent for a specialist and insisted that a specialist examine her, this Dr. Polevski—whatever his name is—why did he do that if he had no idea 40

Argument for Petitioner.

she was suffering from tuberculosis? And then continuing to have sexual intercourse with her after that is sufficient to stamp his story as false, but as your Honor has the testimony of Dr. Ornstein—whatever his name is—of New York—

The Court: Ornstein.

10 Mr. Lane: —Ornstein, the testimony of Dr. Greifinger and the testimony of Mrs. Goldstein, and, if you exclude the testimony of the interested parties, you have still got the testimony of Dr. Ornstein, and how in the world the petitioner can hope to say that he had established the burden resting upon him with the testimony of his own interested clients standing alone as against the testimony of these three witnesses, I cannot conceive.

20 Mr. Unger: What Mr. Lane stated in the beginning would furnish your Honor with the best possible excuse for awaiting the coming in of briefs.

The law having been settled in this State against the contention that he now makes, he endeavors to upset the earlier cases by citing one decided by Vice-Chancellor Backes, and which, if I gather his argument correctly, is that the burden of proof has shifted, that in these kind
30 of cases corroboration is required.

Vice Chancellor Backes did not hold that in Buechler-Simon case. That was a case where the husband sought to have the marriage nullified upon the ground that the wife had been confined in an insane asylum some—I may be wrong, but I think it was—twenty years earlier, and he held in that case that the mere fact that she had been there and had been discharged from there was not in itself sufficient to constitute, or to
40 indicate the perpetration of a fraud upon him in

Argument for Petitioner.

the absence of misrepresentation on the subject.

That is not this kind of a case. This case grows out of those cases which follow *Davis v. Davis*, and which was decided by Vice-Chancellor Lane, and which, to say the least, was the first case in the State which came out squarely on the subject of tuberculosis or a concealment of tuberculosis as a ground for nullity of marriage. 10

Your Honor is probably familiar with that case and I haven't anything more to say in connection with that case than to read the last paragraph in that decision which is this: "The suppression by the defendant of the fact that he was suffering from tuberculosis of the nature that he was, for the reason that he did suppress it, is equivalent in law to an expressed representation on his part that he was free from it." 20

The Court: Well, of course, the only question in this case is, did this man know that she had tuberculosis when he married her. That is it.

Mr. Unger: Exactly. The point that we— (interrupted).

The Court: That case is not in point at all. This man apparently concealed it.

Mr. Unger: Yes. 30

The Court: She says she did not.

Mr. Unger: This case is authority for the proposition that all that need be shown is a suppression, not a representation. It is not necessary that the fraud be proven against whom it is sought to nullify the decree or that he shall represent that he is free from disease; it is sufficient if the party suppressed the fact he is.

The Court: Well, the whole question here is one of fact in concealing. 40

Argument for Petitioner.

Mr. Unger: Yes. I am not quarrelling—(interrupted).

The Court: That case has nothing to do with it as far as I see.

10 Mr. Unger: That case is the authority upon which we bring all these suits.

The Court: Well, all right.

Mr. Unger: That case is authority if I have not made myself—(interrupted).

The Court: Not in this case.

Mr. Unger: If I have not made myself clear to your Honor, that case is authority for the proposition that the suppression of the truth is sufficient.

20 The Court: Yes, but the question here is did she suppress the truth?

Mr. Unger: Yes. Well, I am coming to the facts.

The Court: All right. Go on.

Mr. Unger: I am only referring to this as an indication of what the law is.

The Court: I understand that perfectly.

Mr. Unger: As drawn by a long line of cases.

The Court: I am not interested in that.

30 Mr. Unger: Because of the fact that they furnish the legal authority.

The Court: There is not any legal authority in that at all. The question is did she suppress the truth.

Mr. Unger: Yes.

The Court: That is the question of fact. Just one fact.

Mr. Unger: I follow your Honor on that and that is my one point.

40 The Court: All right.

Argument for Petitioner.

Mr. Unger: I will confine it to the fact.

The Court: I wish you would.

Mr. Unger: (Continuing.) That she suppressed the truth. There is no misrepresentation in this case that she was free from disease, except the representation that Mr. Goldstein testified to that she said she was fit to marry and we will say that was an advertisement. 10

Now, Mr. Lane says that the case of my client stands alone on his testimony. Of course it does. It stands alone on his testimony. Our case is all predicated upon the lack of representation, upon the lack of information, and there can necessarily be no corroboration of something which a person did not say. There cannot be any corroboration of such a thing. 20

Now, I maintain that if your Honor decides this case, not from any extraneous circumstances or not because of any consideration of pity with the other side, but decides it wholly on the evidence, there is enough evidence to warrant your Honor in coming to the conclusion as a matter of law, that the facts are with us. And I will tell your Honor what I mean by that.

There are only two witnesses in this case who testify to the fact that Goldstein was informed prior to his marriage to his wife, that his wife was suffering from the ailment which she was suffering from, and if your Honor can reconcile the testimony of those two witnesses, reconcile it in its different phases and say that you believe those witnesses, if you believe them, after listening to what they testified to, then, of course, I am through. 30

Now, I am referring to Dr. Ornstein, and this is his testimony, this is on direct examination, 40

Argument for Petitioner.

10 page 111. "Just get down to the conversation you had with Goldstein." "Oh, well, I went down to see—when I came down I told Mr. Goldstein that there was nothing to worry about her pulmonary condition, in fact, I tried to explain to him by making a drawing of what had previously happened. I took out one of my prescription pads and sketched what had taken place. I explained—of course, the details of which I cannot just remember exactly, or the exact words that I used, but I made very plainly a diagram showing the form of tuberculosis, the collapse of the lung, the fluid, how the lung was pulled over and how it distorted the trachea and the bronchial into the left thorax."

20 That is on page 111. Now, at the bottom of page 112. "I first congratulated him. I told him he was to marry a very sweet, lovely girl, and that I had known her for a long time as a patient. That I—of course my explanation was to him that he knew what was happening, that I wanted to assure him, being a fiancee, that there was no worry about a tuberculous condition, that this was just a cold and would blow over and she would get well."

30 And then your Honor said: "You informed him in the course of this conversation that the lady had had a tubercular condition?"

And he answered: "Yes. I made a diagram of the whole thing, sir."

And your Honor said, "Oh, well."

That is on 113 and 112.

40 Now, 135 he was cross examined. He was asked about what happened in the room and he said, "Well, I didn't particularly think he was going to annul the marriage at that time, I assure

Argument for Petitioner.

you. I mean, a man naturally—I mean I just don't understand your question. I thought the man might be alarmed as a man in love, if someone dear to him was ill and I wanted to tell him that it was not a tuberculosis process when it was just an acute cold that was bothering her at that particular time."

10

The Court: That is perfectly all right at that particular time.

Mr. Unger: That is the time we are talking about. "Is that what you wanted to tell him?"

"Yes." "That it was not a tuberculous process?" "Exactly." "Was only an acute cold that was bothering her at that time?" "Yes, sir." "And is that what you told him?"

"Yes." "That it was an acute cold? Answer: An acute tracheal bronchitis." "And not a tuberculous condition?" "Yes." "And that she would be all right soon?" "Yes, sir."

20

Now, what did he tell him? Did he tell him that it was not a tuberculous condition?

The Court: He told him in the first place it was a tuberculous process and he said when she had the cold the cold did not—or would not, in his opinion, start up a new tuberculosis.

Mr. Unger: No.

The Court: Well, I—(interrupted).

30

Mr. Unger: Maybe your Honor interprets it that way, but I do not read it that way.

The Court: Very well, that is what I—

Mr. Unger: I wanted to tell him—

The Court: This woman had tuberculosis when she was in Brown University; she came back; she went to Saranac and stayed there; the tuberculosis was arrested; she came home; she had a cold; she was worried; she came back and

40

Argument for Petitioner.

went to bed and all that. That does not mean that another tuberculosis is started or even that the healed one has begun again.

10 I told you at the last hearing that I have a friend who went through this same performance and she is well and strong now and she is only a little younger than I. You can imagine how old she is.

Mr. Unger: Your Honor, I am not trying to quarrel with you or anybody else on whether or not tuberculosis can be arrested. I know it can. I am trying to point out to your Honor what this doctor told this man on this occasion and I am using the doctor's own words against himself to show that he did not tell him that this woman had tuberculosis.

20 The Court: I cannot see it.

Mr. Unger: "I wanted to tell him that it was not a tuberculous process when it was just an acute cold which was bothering her at that particular time." You cannot get anything plainer than that.

Now, the only remaining thing to contradict that is the testimony of Mrs. Goldstein on the stand.

30 Of course, your Honor has got the right to believe it or disbelieve it. Probably an argument which I can use and which is as good as I know is this, that where your Honor is in doubt as to who ought to be believed, probably one of the best ways of resolving the doubt is by trying to determine where the probability of truth lies.

40 This girl would have you believe that although she met this man in the summer of '27 and was anxious that he should know before they were

Argument for Petitioner.

engaged or married what her previous physical condition had been, that she did not tell him until three days before the ring was placed upon her finger, and that she waited until that time because she thought she was all right, and that she told him at that time because she wanted him to know it before the engagement announcements went out. 10

In order for her to fit herself within the confines of her defense, she has got to place the time some time before the engagement or she shows bad faith. She comes out with a statement that she told him it was a "tubercular breakdown" or "a tuberculosis breakdown." She is not sure which expression she used.

Of course, it will not avail your Honor that I say I do not believe it, but I say the probability of the situation is this, that she being in love with the man and not having told him from July, 1927, down to February, 1928, of the ailment with which she had been afflicted, did not tell him on that date and that is the only time that she claims she ever told him except to casually mention it after that. 20

Now, she says he came there in July, 1929. It doesn't make any difference in this case what happened in July, 1929, because the cause of action, if there was one, had ripened before that time; but I don't see how any person can believe a person that testifies that her husband said he loved her, kissed her feet, said he was going to withdraw his case and then almost in the same breath said he wanted his freedom. I cannot reconcile that statement on her part. I cannot reconcile any belief in the fact that it was ever made. To me it is just a conglomeration of trash to think that he would come there, he a 30 40

Argument for Petitioner.

lawyer having—or at least, assumed to have some legal knowledge on the subject, should go and tell her in one breath that he loved her, worshipped her, and then in the same breath almost that he was—(interrupted).

10 The Court: Why should he go there at all after he started the suit?

Mr. Unger: The answer to it is found not alone in his testimony, but in hers. He said that she said she would never have forgiven him if he had not come, and she admitted it.

The Court: Of course, she was fond of him, she didn't want the divorce—

20 Mr. Unger: Of course, there are certain things that people will do that can never be explained. People are enemies, they are against each other, but they will meet on certain occasions, and unless a person is a dog and a cad he must remember something, and I suppose it was the decent thing for him to do, to go and see his wife under those circumstances.

The Court: I don't think so, after he filed a bill of nullity against her; I think it was very indecent.

Mr. Unger: It may have been not proper—

30 The Court: Very improper, I should say.

Mr. Unger: —but she was expecting him to come.

The Court: Why, of course, because she didn't want him to get away from her.

Mr. Unger: She bore that feeling towards him; she thought it would have been small if he did not come and he finally thought the same thing, too.

40 This hasn't any bearing on the case.

Conclusions of Vice-Chancellor.

The Court: No; of course not.

Mr. Unger: It doesn't determine anything, but I do not see how her story of what happened on that occasion can be believed; in the one breath the man repeating and reiterating his love and in the next minute expressing a desire to be free from her, and he already having started the action. 10

I am done, your Honor. I think an intelligent consideration of the evidence—the evidence which should strike your Honor as being right when you read of the inconsistent statements of the doctor must or should impel your Honor to the conclusion that in view of what happened afterwards, this man was not informed of her condition before marriage.

The Court: I am very sorry, Mr. Unger, I cannot agree with you. 20

A great point has been made of the fact that she did not tell him about this trouble before their engagement. I do not see any reason why she should have told him at that time. He was a mere stranger. She did not know whether he was going to propose or not, and I see no reason why she should have advertised her illness to somebody that was a mere caller.

The whole point of this case narrowed down to its correct status is, did this man know before the wedding—the engagement, the engagement ring means nothing—did he know before the marriage that this woman had suffered from tuberculosis. 30

Dr. Ornstein, a distinguished physician from New York, who has no interest in this case except perhaps, as having treated Mrs. Goldstein, has testified clearly and explicitly. He says that he told this man, after congratulations, that this 40

Conclusions of Vice-Chancellor.

woman had had tuberculosis. It was arrested. He showed him a diagram hastily drawn, perhaps, but a diagram, and he explained to him that, and this man went on and said, "in spite of that I will marry her." I have no doubt that he knew thoroughly well what the trouble was.

10 After that statement of Dr. Ornstein he could have withdrawn up to the very marriage day, he could have withdrawn. Apparently he was satisfied to proceed.

It would be a very dangerous proposition for this Court to say, under the testimony, the facts that have been presented to me, that this Court should make a decree of nullity.

I believe that he entered into this marriage contract with his eyes wide open and perhaps

20 when he was unable to secure from his wife, as she has testified, the money he desired from her he tired of her, but, of course, that has nothing to do with the main point.

The main point is this: Did he know before he married her, not before he was engaged to her, did he know before he married her that she had had tuberculosis?

I think and I find as a fact that he did know.

Now, I have heard a great deal of testimony

30 as to the difference between "tuberculosis" and a "tubercular condition." To any lay mind, even to the mind of a physician not a specialist, "tuberculosis" and "tubercular condition" would be practically the same. I think if anyone of us were confronted by the fact that some person was in a tubercular condition, in common parlance, that person has consumption. I must look into this business. And so I am not interested in those fine medical distinctions. Either he was

40 told a "tubercular condition" or "tuberculosis."

Conclusions of Vice-Chancellor.

If he knew of either one of those situations it was his business, if he did not care to marry her, then he should have made an investigation and found out what those words, those menacing words meant.

I do not think it is necessary for me to go any further. The facts conclusively prove to me that this man knew perfectly well when he married this woman that she had had a tubercular condition or a tuberculosis and he married her thoroughly knowing that, and under the laws of both God and man he should take care of her in sick and in health.

10

I will dismiss the petition—the bill.

Mr. Lane: I apply in this case, if the Court please, on the dismissal of the petition for an allowance of expenses to which this woman has been put and the trips she had to take, or her counsel had to take, to Saranac Lake, in the taking of testimony; the cost of the transcription of that testimony and the cost of the copy of the testimony which was taken here before, and a counsel fee. No money has been paid by the husband to the wife, since she was in Saranac in January, 1929, either for support, maintenance or for counsel fees.

20

Mr. Unger: He is the prevailing party, I presume he has the right to ask.

30

The Court: I will allow it. How much counsel fees do you think you ought to have, Mr. Lane?

Mr. Lane: I don't like to fix the amount of the fee. I would like to leave that to your Honor.

The Court: No. I want a suggestion from you. You have been here two days.

40

Discussion.

Mr. Lane: Two days here and Mr. Clancy was in Saranac besides the preparation of the case. I ask for a counsel fee of a thousand dollars.

Mr. Unger: I do not doubt—

10 The Court: Now, we must consider the defendant's faculties.

Mr. Unger: Yes. I do not doubt that Mr. Lane has earned and is entitled to be paid and well paid, but, of course, whether or not we should pay all of it depends, I suppose, upon the ability of both of the parties to the suit to defray counsel fees.

The Court: No. This man has brought the suit.

Mr. Unger: Yes.

20

The Court: And he has lost; he must suffer from it.

Mr. Unger: Yes, but—

The Court: Now, I am not going to penalize him. I do not know what his faculties are.

Mr. Unger: Well, it sounds a little large, not for Mr. Lane to get, but for Mr. Goldstein to pay.

The Court Well, how much—

30

Mr. Unger: Your Honor has had a fair indication on the witness stand. I think he said he made \$7,500 last year, and, of course, I am influenced by the fact that Mr. Lane will not go unpaid, if your Honor does not make Mr. Goldstein pay all that you think Mr. Lane is entitled to, because I believe the financial standing of the wife has been testified to here, is at least sufficient to pay him in part.

40

The Court: I do not think the wife should be called upon to pay anything, when a husband comes in with a case of this kind.

Discussion.

Mr. Unger: In view of his earnings I would say the amount is a little too large.

Mr. Lane: Let me say the testimony is he made net \$7,500 last year. What the deductions were from losses does not appear by the testimony before your Honor.

Mr. Unger: Well, conditions are worse this year. 10

Mr. Lane: I know.

The Court: The market is very bad.

Mr. Lane: The market may be bad, but probably some lawyers who have invested or taken their money over to Wall street and lost it may retain it—retain what they are getting.

The Court: Now, Mr. Goldstein has got to pay for all this transcript; that will be how much? 20

Mr. Lane: Mr. Salmon knows that.

(The Court was informed by the stenographer that the amount for testimony taken before him in this case was \$300.)

Mr. Unger: I think we have already paid for one.

Mr. Lane: I should imagine the testimony in Saranac should be around \$60; something like that. 30

The Court: And then if Mr. Clancy went up there simply and quietly the expenses could not have been very much.

Mr. Lane: Not very much.

Mr. Unger: I was with him and I will say he went simply.

The Court: Really, Mr. Lane, I think a thousand dollars is too much. I will allow you \$700. 40

Exhibit P. 1. Deposition of Dr. Brown, direct.

EXHIBIT P. 1.

IN CHANCERY OF NEW JERSEY.

	<p style="text-align: center;"><i>Between</i></p> <p>10 GUSTAVE L. GOLDSTEIN, <i>Petitioner,</i></p> <p style="text-align: center;"><i>and</i></p> <p> REGINA GREIFINGER, otherwise REGINA GOLDSTEIN, <i>Defendant.</i></p>	<p style="font-size: 3em;">}</p> <p><i>On Petition. Depositions.</i></p>
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20 Transcript of shorthand notes of the testimony of Dr. Henry Leetch, Dr. Lawrason Brown and Mr. Rudolph Plank taken in the above-entitled matter at their respective offices in Saranae Lake, New York, on Thursday, September 19, 1929, by and before Herman Winard, a New Jersey Supreme Court Examiner, pursuant to the annexed stipulation entered into between counsel for the respective parties hereto.

Appearances:

30 Milton M. Unger, Esq., on behalf of the petitioner.

 John J. Clancy, Esq., on behalf of the defendant.

 Herman Winard, stenographer.

DR. LAWRASON BROWN, sworn by the Examiner.

Direct examination by Mr. Unger.

40 Q Doctor, you are a licensed physician in the State of New York? A I am.

Exhibit P. 1. Deposition of Dr. Brown, direct.

Q And you maintain your office at Saranac Lake, New York? A Saranac Lake, New York.

Q How long have you been a physician? A I think since 1900, over twenty-nine years.

Q Do you specialize in any particular branch? A In diseases of the lungs, more particularly tuberculosis of the lungs. 10

Q How long have you specialized in that kind of work? A Twenty-nine years.

Q Are you connected with any institutions in this vicinity? A Yes. I am connected with the Trudeau sanitarium.

Q That is a large institution? A Yes, about a hundred and seventy or eighty beds.

Q How long have you been connected with it? A I have been connected with it in one capacity or another for twenty-nine years. 20

Q Are you connected with any other institutions in this vicinity? A I am on the board of trustees of the Ray Brook sanitarium.

Q Where is that located? A That is located about four miles out of Saranac Lake, on the road to Lake Placid. That is a State institution.

Q Do both of these institutions treat people affected with tuberculosis of the lungs? A They do. 30

Q Have you written some books on tuberculosis? A I have written a book, a layman's book that you have in your hands.

Q Entitled— A Rules on the recovery from tuberculosis.

Q Now, doctor, won't you tell us what kind of a disease tuberculosis of the lungs is? A A chronic relapsing disease.

Q Is it an infectious or contagious disease?

A Yes, it is both infectious and contagious. 40

Exhibit P. 1. Deposition of Dr. Brown, direct.

Q Can this disease be transmitted to children or offspring? A Yes. To that I might say less by heredity than by direct contact after birth.

Q It is a germ disease, is it not? A A germ disease.

10 Q It is contagious and infectious? A Yes.

Q Where is it more apt to flourish, on the inside or on the outside? A You are more likely to contract the disease in the house than you are out of doors because you come in close contact.

Q Will you explain how it can be contracted on the inside? A It can be contracted on the inside from dust, from dry secretions, or it can be contracted by dry droplets which patients cough out, which is the more usual way. If you stand in front of a mirror and cough, you will
20 see on the mirror, on the pane of glass, and they may contain germs.

Q Has this disease different stages? A Yes.

Q What are the stages? A Well, they group them in the early, the minimal stage, moderately advanced and the advanced.

Q I wonder if you can give us an explanation of what each stage consists? A The name "minimal" defines the first stage, which means the patient has as little of the disease as you could
30 detect and be positive from the diagnosis. In a moderately advanced stage it means the disease has advanced further, and the following advanced stage is such that the ravages of the disease has the lungs seriously affected, and with very often a cavity in the lung.

Q Is this a disease which in your opinion can be cured? A It can be cured, but we never can tell when it is cured; and we think that the vast majority of all patients are never cured,
40 but simply have the disease arrested.

Exhibit P. 1. Deposition of Dr. Brown, direct.

Q When you speak of an arrest, what do you mean by that? A We mean by that if the disease is arrested the patient is practically—to the layman he may have no more symptoms and to the physician the disease is not advancing; it may be retrogressing and may be stationary and may never progress again, or it may after several years light up again and go ahead. That is the reason we call it arrested and not cured. 10

Q Is it possible to determine whether there is a cure in the sense that you speak of until after the lapse of a certain length of time? A No. Time is the only true method, the only true yard stick measuring whether or not the disease is arrested.

Q You have told us what you mean by the word arrested. When the disease gets to the point when it may be said to be arrested, from that time on is it true that only the lapse of time can determine whether or not there will be a re-occurrence of the disease? A Yes. The disease almost always—I wouldn't say almost always, but in a large number of cases, relapses. 20

Q Do you speak of a person who has had the disease apparently arrested and distinguish that from a situation where the disease has been arrested? A Yes. When a person loses the symptoms we do so contend that the disease is apparently arrested, after a sufficient length of time—usually for months or even longer; we say the disease is arrested. 30

Q And then if after that a person keeps well indefinitely, then it may be said that the disease has been finally arrested? A Yes, finally arrested, and some people even use the term "cured," even though they use it in a sense, though they cannot prove that they are correct. 40

Exhibit P. 1. Deposition of Dr. Brown, direct.

Q Then if after there has been an arrest or an apparent arrest a re-occurrence of the disease takes place, is that or not an indication that no cure has taken place? A Absolutely.

10 Q How long a time should elapse after a disease has been arrested or apparently arrested before it can be said to be cured in the sense in which you say people use the term "cured"? A Ordinarily we like to have a patient back living under the ordinary conditions of life, under the usual strain of life, in two or three years, before we can say the patient is apparently cured.

20 Q In your opinion, doctor, is it possible for anyone to say with any degree of certainty or definiteness when a person passes from the condition of an arrest of the disease into a cure? A It is impossible to say that the cure has occurred with any degree of certainty. It is merely a guess.

Q you have stated that this is a germ disease? A Yes.

30 Q While the germ is alive in the affected parts can there be a cure? A The disease is not really cured as long as the germ is living in the body, and the germ, you know, can live in the body for years, and we have no method of telling when the germ absolutely dies out in the body.

40 Q Where a person is afflicted with this disease and marries, in your opinion does sexual intercourse have any effect on that disease? A Sexual intercourse, of course, may affect the disease unfavorably if the person is at all passionate. I think that is the crux. It is more dangerous for a woman, of course, because she may become pregnant, and pregnancy is not a favorable condition.

Exhibit P. 1. Deposition of Dr. Brown, direct.

Q Disregarding the question of pregnancy altogether, would you say that marriage and the ensuing sexual relations, in so far as the female is concerned, have a tendency to cause a re-occurrence of the disease, assuming that the sexual relations were normal? A In the majority of cases I don't think it would for a woman; I don't think so. 10

Q Did you have occasion, doctor, during July of this year to examine X-ray photographs purporting to have been made of Mrs. Regina Goldstein, the defendant in this suit? A I did.

Q From whom did you obtain those plates? A They were submitted to me from the office of Dr. Edgar Mayer.

Q Did you understand that he had been the physician for Mrs. Goldstein? A I did. 20

Q Were those plates identified in such a way as to enable you to determine whose pictures they were? A Yes. As I recall it, they were given to me by Dr. Mayer with the understanding that they were Mrs. Goldstein's plates; and I cannot be positive whether or not they had her name on them or not, but they had certain definite numbers and they came from his office, and there was no reason to believe that they were not the plates. 30

Q What plate numbers did they have? A Plate No. 2796 and dated March 28, 1929, and another, a second plate, 3136, dated July 11, 1929.

Q And these were put in your possession? A By Dr. Mayer.

Q And you examined them? A I examined them myself.

Q What did the earlier plate of March 28, 1929, disclose? A It disclosed a very slight dis- 40

Exhibit P. 1. Deposition of Dr. Brown, direct.

ease in the upper third of the right lung, an extensive disease and cavity formation in the upper half of the left lung, and, furthermore, the displacement of the mediastinal contents to the left indicates apparently that the disease has been present for some time.

10 Q You used a technical phrase here in your last answer. I wonder if you won't give us an explanation of that. A The mediastinal contents. The mediastinum is the area, really, between the two lungs and above the heart, and that when it shifts from one side to the other usually indicates that the disease has been existent for some time; and in this case the mediastinal contents has shifted to the side. I think to the left side, which would indicate that the

20 disease was of long standing.

Q You also examined the plate of July 11, 1929? A I did.

Q What number was that? A 3136.

Q What did your examination of that plate disclose? A It disclosed a slight amount of disease in the upper third of the right lung and an extensive disease throughout the left lung with cavity formation in the upper third. I furthermore compared this plate 3136 with plate 2796

30 and found that there was an increase of disease on each side.

Q And the interval of time which had elapsed between the taking of the two plates was between March 28th and July 11th, 1929? A Yes.

Q Now, doctor, from the examination which you made from both plates you formed an opinion as to how long the disease had existed? A Well, it is impossible to say how long the disease might have existed, but I formed an opinion that it existed over a considerable period of

40

Exhibit P. 1. Deposition of Dr. Brown, direct.

time. It is impossible to say whether it was one or two or five or six or even ten years, it is impossible to say, on account of the fact that tuberculosis is a relapsing disease and each relapse may not be very serious but very slight, and bring on more and more disease until in the end you find a very extensive disease in the lungs. 10

Q And based upon the examination as disclosed by these two plates and from comparison between the two, had there or had there not been an increase in the disease or an increase in the extent of the disease between March 28, 1929, and July 11, 1929? A There was an extension of the disease.

Q When you were finished with these plates what did you do with them? A I returned them to Dr. Mayer. I can't recall, I can't say that I did personally; but I left them with my secretary. 20

Q As far as you know they were returned to the place you took them from? A Yes.

Q You were asked to make this examination on behalf of the petitioner in this case, Mr. Goldstein? A I was.

Q Did you make a request for all of the plates of Dr. Mayer relating to this lady? A I don't recall it. Mr. Goldstein asked Dr. Mayer to submit the plates to me, and I spoke to Dr. Mayer about the subject and he said he would be glad to submit the plates. 30

Q Did you understand from him that they were all the plates that he had? A I did, that they were all the plates in his possession at that time.

Q Doctor, do you recall that you were requested by Mr. Goldstein to make inquiry of Dr. 40

Exhibit P. 1. Deposition of Dr. Brown, direct.

Mayer to determine whether or not the plates that were turned over to you were all of the plates and that you did make that inquiry? A I think I did. I am not certain of this, but my recollection of it was that there had been some other plates which could not be found; that is
10 my recollection.

Q But at least there were all that were turned over to you for examination? A These were all that were turned over to me.

Q Were there turned over to you any X-ray plates which were taken or purported to be taken by Dr. Ornstein or by any other physician? A No. They are the only plates that I have seen.

Q Doctor, I would like to ask you whether
20 or not you consider that a nervous condition in the wife in a case of this kind would aggravate this disease or bring on a recurrence of it? A I think anything which upsets a person might bring on a relapse if the disease is not very firmly arrested. It might do it. We find sometimes nervousness, sometimes slight over-exertion, worry, any of those things might bring on a relapse.

Q Suppose, doctor, the disease had been ar-
30 rested, as you have heretofore defined that, would you say that an ordinary case of nervousness would cause a recurrence of it? A If the disease had been thoroughly arrested?

Q Yes, as you defined "arrested" to me. A It is impossible to say anything very definitely. Ordinarily a slight amount of nervousness would not cause it, but a very considerable degree of nervousness might upset a patient that they could get a relapse.

40

*Exhibit P. 1. Deposition of Dr. Brown, cross.**Cross examination by Mr. Clancy.*

Q What are some of the causes of a relapse, doctor, in addition to nervousness, or, I think you said, slight exertion? A Yes, I said sometimes slight over-exertion. Well, there may be a number of things—for instance, an attack of influenza, a very severe cold, various depressing conditions—in fact, anything that upsets the general health of an individual may bring about a relapse of the disease in the lungs. 10

Q Whether it is due to over-exertion, physically, or to worry or nervousness? A That could all bring about a relapse providing the cause is sufficient.

Q Overindulgence in sexual intercourse being over-exertion might cause a relapse after a case which was arrested? A It might. It is more likely to do so in a man than in a woman. 20

Q But it can happen in a woman? A It can happen in a woman if she were very passionate.

Q And if there were overindulgence in sexual intercourse accompanied with worry from aggravation on the part of a man, would those two combined, if not alone, be sufficient in some cases to cause a relapse? A Yes, they could in some cases. 30

Q In a case that had been seemingly arrested, too? A In a case which had been apparently arrested.

Q Tuberculosis, you said, was a germ disease? A Yes.

Q And it is infectious, contagious? A Yes.

Q And more apt to occur through infection or contagion than it is to occur generally, isn't it? A Much more.

Q The only knowledge that you have of those plates that you examined of March 28th and 40

Exhibit P. 1. Deposition of Dr. Brown, cross.

July 11th, which you have identified by number were plates of Mrs. Goldstein, is the fact that you secured those plates from Dr. Mayer when you asked him for the Goldstein plates? A Not at all.

10 Q You never examined the patient? A I never examined her.

Q And from your own knowledge you don't know whether those were the plates or not? A I don't.

Q And you didn't return the plates personally to Dr. Mayer? A No, I never did. I subsidized someone to do that part of the work.

20 Q You say that a case is apparently arrested when the person loses the symptoms? A Loses the symptoms and signs. I mean by that, of course—for instance, the temperature is normal over a considerable period of time, the pulse is normal, the cough disappears, the expectoration practically disappears; it contains no tubercle bacilli; after a long period time the patient can return to the usual activities which the ordinary life entails, and we think it is arrested, sufficiently apparently arrested to allow the patient to live the usual life at home, over a period of a year or more.

30 Q Assuming a patient had lived and been treated for some time at a place such as this at Saranac, and had been informed that the case was arrested or apparently arrested, and had gone back to a normal life for a period of time—a year or so, or two years—an examination at the end of that time wouldn't be more or less conclusive as to whether or not the diagnosis in the first instance that the case was not arrested would be correct, is it? A It usually is if the patient
40 conveys the right information to the examining physician.

Exhibit P. 1. Deposition of Dr. Brown, cross.

Q Well, diagnosis generally depend upon the history secured from the patient? A It does.

Q And without that there can be no real, true diagnosis unless there are certain other things present which indicate that? A You can't make a diagnosis without the statement by the patient whatsoever; but it is impossible to state definitely unless the patient is under exceedingly close observation whether or not the disease is arrested. 10

Q Tuberculosis is curable, isn't it? A It is curable, but it is rarely cured.

Q Well, you say it is rarely cured because you can never tell when it is cured? A You never can tell when it is cured; and the vast majority of all cases never pass beyond the stage of an arrest of the disease.

Q Isn't it possible that a condition of arrest can so exist if there never is a relapse? A It is possible. 20

Q It frequently happens in cases, doctor, where there is proper care and attention? A It usually happens that a patient with an arrested disease, they go along, the disease may remain arrested or apparently arrested and remain so until they die from some other disease.

Q The only way that a physician can verify his opinion that a case which he has called arrested or apparently arrested is so arrested or apparently arrested is by an examination after a period of time after the patient has resumed his or her normal life? A Yes—not only from an examination but also from an absence of all symptoms, which you cannot determine from an examination alone. Time is the only proof. 30

Q Where there has been an arrest or an apparent arrest and due to some cause there is a recurrence, it is possible then to arrest the disease again, is it not? A Yes, it is possible. 40

Exhibit P. 1. Deposition of Dr. Brown, re-direct.

Q After a great number of relapses? A After many relapses it is still possible for the disease to become arrested.

10 Q Does the harm from the sexual intercourse come where a person is passionate by reason of the violence or the exertion which usually happens in those cases? A It may come from the exertion and also possibly from the congestion of the lungs which may occur in some cases.

Q Is it the rapid beating of the heart that has something to do with it? A Possibly that; but we do know occasionally hemorrhages follow intercourse.

20 Q Wouldn't that same result follow where the husband was passionate as well as the wife? A No, I don't think it would. The party to suffer that way must be passionate themselves.

Q Over-indulgence in sexual intercourse even where the woman is not passionate, by reason of the fact that it entails exertion, increase in the heart beats by reason of the exertion, might of itself cause a relapse, would it not? A It is possible that it might, but it is not very likely when the woman isn't passionate.

Re-direct examination by Mr. Unger.

30 Q Doctor, you said that tuberculosis is rarely cured, but may be curable? A I said it is curable but rarely cured.

Q It is curable but rarely cured? A It is curable but rarely cured.

40 Q From the examination which you made from these plates, of the X-ray photographs which had been taken on March 28, 1929, and on July 11, 1929, can you say whether or not the patient was then cured, the patient whose photo-

Exhibit P. 1. Deposition of Dr. Brown, re-cross.

graphs had been taken? A No, that patient was not cured.

Q From the examination made by you of the photographs at that time, can you say whether or not she was cured in 1928?

Mr. Clancy: I object to this entire line of examination about the plates unless the plates are properly identified as the plates. This is subject to my objection. 10

A I think the patient had not been cured of the tuberculosis which existed previously.

Q And a proper examination made of her by a physician in 1928 would have disclosed that in your opinion? A It might or might not have disclosed that. As I said, examinations don't tell. Time will tell. And time in this case has shown that the previous disease was not arrested. I consider this to be a relapse of the previous disease. 20

Re-cross examination by Mr. Clancy.

Q From your examination of those plates you can't tell, can you, doctor, when that relapse occurred? A No; it was impossible to tell when the relapse occurred. 30

By Mr. Unger.

Q When you speak of relapse you mean the condition which appears to exist on the X-ray plates of March 28th and July 11th, 1929? A I do. I have no other source of information.

Q I understood you to say that condition showed the disease existed for some time prior to that? A Yes, the disease had existed for 40

Exhibit P. 1. Deposition of Dr. Brown, re-cross.

some time prior, but it is difficult to say when the relapse had occurred. The disease is advancing between the time of the two plates.

Q In your opinion, had the disease existed in 1928? A What was the date of the first plate?

10 Q March 28, 1929. A It might have been, yes; it existed for some time.

Q And a physical examination, properly made, in 1928, would have disclosed that? A That is impossible for me to say. I am absolute in my opinion that it should have disclosed that.

Q A proper examination? A A proper examination.

20 Q These X-rays were made, one in March, 1929, and one in July, 1929, and I understand you to say that the disease must have existed in 1928—rather that in your opinion it existed in 1928? A In my opinion.

Q And as such, in your opinion, wouldn't it have been discoverable upon proper examination in 1928? A I think it would.

Q The same method of discovering it, could it have been employed in 1928 as it was in 1929? A It could.

Q Namely, the X-ray? A Yes.

30 Q And based upon the condition that you found to exist on these plates taken in 1929, would it in your opinion have been disclosed by plates taken in 1928? A It could very easily have been.

Q The disease as you found it to exist from the plates in 1929 was of some age? A Yes, of an advanced character.

40 Q I might go a little further and ask you what there is in the plates which indicates to you the length or how you determine how far back the disease had gone, your previous evi-

Exhibit P. 1. Deposition of Dr. Brown, re-cross.

dence being limited to the statement that it had been present for some time? A Unless the disease is very acute, you don't find such extensive disease throughout the whole lung or a cavity formation in the upper part of the lung until the disease has been present for some time, usually for months, sometimes for years, and it is this that I base my opinion that the disease had been present for, I should judge in this case, for several years. It is impossible for me to say absolutely. 10

By Mr. Clancy.

Q Did you say it is determined by the extensiveness of something? A By the extensive disease and the cavity formation, the cavity in the upper part of the lung. 20

Q It is possible, is it not, doctor, to find such extensive disease and such cavity formation in patients where the condition is not of long standing but has been acute? A It is possible, but usually the condition would be different from what was disclosed in these plates.

Q You can't tell, can you, doctor, from those plates at what time prior to the taking of those plates that case had been arrested or apparently arrested without knowing the history? A It is impossible to state just from the plates, to state just when the relapse occurred or the presumed arrest of the disease. 30

Exhibit P. 1. Deposition of Dr. Leetch, direct.

DR. HENRY LEETCH, sworn by the Examiner.

Direct examination by Mr. Unger.

Q You are a duly licensed physician of the state of New York? A Yes.

10 Q And you practice in Saranac Lake? A Yes.

Q How long have you been practicing? A In 1921 I went on the staff of the Trudeau sanitarium. I was there until the end of 1923, since which time I have been in private practice here in Saranac Lake.

20 Q How long have you been practicing as a physician, since what time? A Including the hospital experience. I graduated in 1919. I had a year in the hospital in Washington until the fall of 1920; I broke down. I came up here as a patient until the fall of 1921, and since that time I have been continually working.

Q Are you connected with any other institutions outside of Trudeau? A I am not connected with Trudeau.

Q You were connected. A I was connected with Trudeau. I am on the visiting staff of the National Vaudeville Artists.

30 Q Do you specialize in any particular branch of medicine? A Tuberculosis.

Q Of the lungs or chest? A Yes, pulmonary tuberculosis.

Q Doctor, are you acquainted with Regina Goldstein, the wife of Gustave Goldstein, the petitioner in this case? A Yes.

Q When did you first meet her? A I cannot give you the exact date. It was sometime fairly early in 1924.

40 Q Where was that? A In Saranac Lake.

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q In what place? Whereabouts in Saranac?

A In a boarding house here. I am not quite certain of the place.

Q Under what circumstances? A I was called in to give her a pneumo-thorax two or three times during the absence of Dr. Mayer from Saranac Lake.

10

Q Was she his patient? A Yes.

Q Will you tell us in other than medical terms what that is? A That is a treatment to immobilize the lung, to put the lung at rest by introducing air in the pleural cavity outside of the lung, which collapses the lung and puts it out of commission temporarily for as long as the air is introduced.

Q And that treatment is given to patients who are suffering from disease? A Yes.

20

Q What kind of disease? A From pulmonary tuberculosis in this case, which is either entirely or mainly confined to one lung.

Q Did you get from her a history of the case? A At that time no.

Q Did you make any examination or diagnosis of the case at that time? A The only examination of which I have a record or remembrance is the record of the sputum examination which I made on February 7, 1924. I examined her sputum and found it positive.

30

Q What does that mean? A Positive for tuberculosis.

Q That indicates the presence of it? A Yes.

Q The presence of the germ? A Yes.

Q Did you continue to treat her after that? A No.

Q When next did you come in contact with her? A In 1929.

Q This year? A Yes.

40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q And that was in February? A Yes.

Q Where? A At 88 Riverside Drive in Saranac Lake.

10 Q Under what circumstances did you treat her? A I was called in to see her again during the absence of Dr. Mayer from the village.

Q Did you make an examination of her at that time? A I did.

Q Who was present? A Dr. Greifinger was present the second time I saw her.

Q That wasn't on the first occasion in February? A I believe not.

Q Who else was there outside of yourself and the patient? A I don't know if there was anyone.

20 Q Was her husband there, Mr. Goldstein? A He was there, I am quite certain, on the second examination. I don't remember about the first.

Q Before you made the examination on that day did you get any history of her case up to that time from anyone? A From her, yes.

Q From her in person? A Yes.

30 Q What did she tell you? A I assume that if Mr. Clancy doesn't interrupt me that it is all right for me to answer any of these questions. That is correct, is it not?

Mr. Clancy: Yes, unless I interrupt.

40 A (Continuing) The history that she gave me was that of having been quite well until the previous March, which would be March of 1928. As I recall it, it was about March, early in the year, she had contracted a severe cold and bronchitis, and had recovered from that in the fall. I am necessarily hazy on these dates for the reason that she not being my patient I did not transcribe

Exhibit P. 1. Deposition of Dr. Leetch, direct.

the history; I simply asked her about it to know the time. Some time during the fall she had commenced to run down and had then found that her disease was again active. That is my memory on the history.

Q I assume you are referring to the previous fall, of 1928. A Yes. 10

Q Did she give you any history of the case between or prior to the fall of 1928? A None that I recall, other than she had been quite well and working most of the time between the time that she left here and when she returned.

Q Did she tell you she had been married in the meantime? A She did, yes.

Q Did she give you any further history or any more information about her trouble other than that which you told about? A Do you refer to her physical trouble? 20

Q Yes. A That is as much as I recall.

Q Do you recall whether or not she told you of anything that in her opinion could or might have aggravated the disease or caused a recurrence of it? A Not very well. It is my more or less hazy remembrance that she said she had been doing too much for her strength. That is what every patient would tell you. It is quite obviously true. 30

Q She wasn't any more specific than you say she had been doing too much? A She didn't use those exact words, of course; but that is as much as I can remember of it.

Q I understood you to say that your examination of her took place at some address. A Yes.

Q It didn't take place in your office? A No.

Q I am trying to refresh your recollection, doctor, and ask if you recall that you had a conference with Dr. Greifinger before she was ex- 40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

amined. I may be wrong about it. I am just trying to recall it to you to see if that isn't so.
A Yes, I did.

Q Was that in the presence of Mrs. Goldstein? A No.

10 Q Did you get from him any history of the case? A My recollection of the conference was simply the usual talk that any member of the family would have had with me before I examined her. She was in very low spirits; and, as I recall it, his conference was simply to ask me to make things appear as bright as possible for her in order to cheer her up.

Q Without going into any history of what had happened? A I don't recall any.

20 Q Was Mr. Goldstein also present at that time? A No.

Q I am speaking now of the preliminary meeting in which he told you to brighten her up.
A Yes.

Q Was Mr. Goldstein there at that time? A I believe not.

Q Then you did make an examination of her later in that day? A Yes.

30 Q Where did that take place? A 88 Riverside Drive, Saranac Lake.

Q That is the Lynch cottage? A Yes.

Q Was anybody present at that examination?
A Dr. Greifinger and Mr. Goldstein were present.

Q In the room? A As I recall they were.

Q What did that examination consist of? A An ordinary physical examination of the chest.

Q What did it disclose? A It disclosed a pathology in the left lung. Do you want me to describe that?

40 Q Oh, yes. I want you to describe the condition you found at that time. A I found an

Exhibit P. 1. Deposition of Dr. Leetch, direct.

impairment of note over the left lung with diminished breath sounds, a few moderately coarse rales in the upper half of the lung. The right lung was apparently normal. The interpretation of that doesn't mean anything to you, I presume. You want my interpretation?

Q Yes, what that condition indicated to you? 10

A It indicated to me, in the light of my previous knowledge of her, that she had a thickened pleura, which is the usual after result of pneumothorax, that she had some disease at least in the upper part of the left lung. That is as much as I could interpret from the physical examination alone.

Q Did this examination indicate to you whether or not the disease had increased since the last time you had examined her in '24? A I didn't examine her in '24. In any case I couldn't examine her lung at that time because it was collapsed. 20

Q This was the examination of February 20th. Did you prescribe anything for her at that time?

A Either at that time or subsequently I prescribed for her a nerve sedative.

Q Did you then express an opinion as to how long she would have to remain at Saranac Lake?

Mr. Clancy: To whom—to her? 30

A To her I may have.

Q I assume this was all in the presence of the husband. A I may have expressed such an opinion. Frankly, whatever I told her didn't mean very much. She was very depressed, and while I felt that she was probably due for at least six months to a year on the cure, I didn't feel at that time that she was in the proper mental condition to be told such a thing. 40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q You probably made light of it as far as she was concerned? A Yes.

Q In an endeavor to make her feel better? A Yes.

10 Q Did you discuss the matter with her husband on that day? A As I recall it, I made an appointment with him. I saw him in the morning of that day—isn't that right, Mr. Goldstein—and discussed the thing fully with him.

Q That is preliminary to the examination? A Prior, yes. So I don't believe I talked very much with him. He remained with her while I talked with Dr. Greifinger downstairs.

20 Q Of course, you didn't discuss her condition or what you had found with Mr. Goldstein in the morning because you hadn't yet examined her. A I had examined her a day or two previously.

Q Prior to February 20th? I am speaking now of February 20th. A No, I didn't discuss it with him before.

Q Was there a subsequent examination three or four days later? A Yes; I examined her when I saw her again.

30 Q Who was present at that examination? A There was no one present at one examination. At the other one Mr. Goldstein and Dr. Greifinger were present.

Q And then at the second one— A That was the second one, I am quite sure. The first one I saw her before Mr. Goldstein and Dr. Greifinger had arrived.

Q That is the examination that you have testified to? A The examination at which Mr. Goldstein was present.

40 Q After the second examination, as you put it, did you have a conference with Mr. Goldstein and Dr. Greifinger in your office? A Yes.

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q And on that occasion was there an examination of X-ray plates? A Yes.

Q Where did these X-ray plates come from?

A They came from Dr. Ornstein's office.

Q How did they get to you? A They got to me from our X-ray files. Dr. Mayer had previously received them, rather, from Dr. Ornstein or Mrs. Goldstein; I can't state.

10

Mr. Clancy: I object to all the testimony on the X-rays unless the X-rays are presented and properly proved.

Q The X-rays came from Dr. Mayer's file?

A Yes.

Q And that file was made available for you?

A Yes.

Q And these X-rays were examined by you in the presence of Dr. Greifinger? A Yes.

20

Q Did he tell you what they were?

Mr. Clancy: I object to that for the reason that the defendant was not present.

A I don't know that he told me in so many words that they were Mrs. Goldstein's plates. I naturally assumed, since I had no reason to think that Ornstein or Mayer would fool me, that the plates that were labelled Mrs. Goldstein's were Mrs. Goldstein's plates.

30

Q You proceeded upon the assumption that they were? A Yes.

Q And they were identified in some way? A They had her name attached to the plate.

Q Did they have the name of any physician attached? A That I cannot say.

Q Did Dr. Greifinger participate in the examination which you made that day and read them with you? A Yes.

40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q Did he dispute the fact that they were Mrs. Goldstein's plates? A No.

Q Or question them in any way? A No.

Q You know Mr. Plank? A Yes.

Q He is an X-ray man? A Yes.

10 Q Did he participate in this conference? A He was present in the office at the time of the conference. I cannot recall absolutely that he participated in the conference; but I assume that he probably did, since that would be the ordinary and reasonable thing for him to do were he present.

Q Do you remember that he went into the dark room and examined the X-ray plates with you? A I think the previous question answers that as well as I can answer it.

20 Q How many of these plates were there? A Several is all I could say. They were sent back to Dr. Ornstein quite shortly afterwards.

Q By whom? A By Dr. Mayer.

Mr. Clancy: I object to that and ask that it be stricken out.

30 Q You understand. A I understand they were sent back to Dr. Ornstein. I haven't seen those particular plates since February.

Q Do you recall the date upon which these X-ray plates were made? A I do not.

Q Do you recall the year? A You are speaking of Dr. Ornstein's plates?

40 Q I am asking you whether you recall the date upon which they were made as would appear from the notation on the plates? A Unquestionably the exact date was on the plate. I don't recall that; but my memory is that they were fairly recent plates since they would have been

Exhibit P. 1. Deposition of Dr. Leetch, direct.

of not much value otherwise; and it is my impression that they were taken sometime during the late fall or winter of 1928.

Q Do you recall whether any of them went back to 1927? A No.

Q What did they show? A They showed a very marked thickening of the pleura throughout the left lung, which was so dense that most of the lung markings were hidden. However, there was an annular shadow or rarefaction in the upper third of the left lung, which gave the appearance of cavitation. Such plates are extremely difficult to read so that anything that is seen in the lung is so under this thick white appearance that the pleura has that it is to be guessed at rather than definitely diagnosed. 10

Q Did you form an opinion based upon your examination of the plates at that time as to the disease with which Mrs. Goldstein was then afflicted? A Just a moment. I forgot to state that the right lung was practically normal. By that I mean there was questionably a small scar in the first interspace—that is, between the first and second ribs, as it appears on the plate. 20

Q (Last question read by stenographer.) A That is, assuming that I knew nothing of Mrs. Goldstein except what I saw in the plate—is that what you mean? 30

Q No—including what you would ascertain from the plate and taking into consideration the past history of the case as you knew it.

Mr. Clancy: And your examination of her.

Mr. Unger: Oh, yes.

A From my examination of her sputum which I made in 1924 I knew she had tuberculosis of the lung. 40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q And she had had it for what period of time? A To my knowledge, since February 7th, 1924.

Q Your examination made in your treatment of her in 1924 and your examination made in 1929 confirmed that belief, did it? A Yes.

10 Q Did you observe whether her lung had been let out in 1929? A Yes.

Q That is a medical expression? A That is as good as any expression. The lung had been allowed to re-expand; the pneumo-thorax was discontinued.

Q On this occasion did Mr. Goldstein ask you what the matter was with his wife? A He did.

Q What did you tell him?

20 Mr. Clancy: I object for the reason that the question calls for an answer which is hearsay, which is a conclusion and not made in the presence of the defendant.

A That she had pulmonary tuberculosis involving the left lung.

Q Did he ask you how long in your opinion she had been suffering from it?

30 Mr. Clancy: The same objection.

A Yes.

Q What did you tell him?

Mr. Clancy: The same objection.

A That she had had it since the time—to my knowledge, since the time that I had seen her in Saranac Lake in 1924.

40 Q Did he ask you whether or not in your opinion she should have married?

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Mr. Clancy: The same objection.

A That I cannot say.

Q You don't recall? A I don't recall. It is my impression that he did not.

Q Did you tell him in terms which were not medical just what the condition of her lung was? 10

Mr. Clancy: The same objection.

A Yes.

Q Do you remember what you told him? A I told him approximately what I have testified, that she had pulmonary tuberculosis involving at least the upper portion of the left lung with a probable cavity of the apex, and an extremely thickened pleura throughout. 20

Q Did you indicate to him the probable duration of her illness in your opinion?

Mr. Clancy: The same objection to the entire line—I don't have to interrupt—for the same reasons.

You mean the future, Mr. Unger?

Mr. Unger: Yes.

A I told him that she must have had it since she was here in 1924. 30

Q Do you recall whether he asked you if in your opinion an operation would be necessary?

A He did.

Q And your answer was what? A My answer was that did she not respond to rest in bed such as she has had, it might be advisable to give her one or both of two operations in the order named, first, phrenicotomy; this not being successful, thorocoplasty. 40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q Was that your opinion? A Yes.

Q Do you know whether or not he asked you if she became better or made a recovery would she be able to resume household duties, matrimonial relations, and bear children, and so forth? A I don't recall that.

10 Q You said that you expressed yourself as being of the opinion that it might be necessary to resort to one of two operations. A One or both.

Q One or both operations. Why? A Why would she have to have one or both?

Q Yes. A You will recall when I answered your first question about the operations I said if she didn't respond to the ordinary rest she might have to undergo one or both of these two operations. The phrenicotomy, which is the first I mentioned, is a very minor operation which sometimes will prevent the necessity for the very widespread and serious operation—extensive, I should say, and serious operation of thorocoplasty, which is the removal of portions of all of the ribs.

Q The disease of tuberculosis has its different stages, has it not? A Yes.

30 Q In your opinion, what stage had it arrived at so far as it concerned Mrs. Goldstein? A I will have to qualify that answer. If my interpretation of her X-ray plate is correct, that the rarefied area in the apex is a cavity, she would automatically fall into the group which is termed far advanced.

Q Of course, your statement that one or both of these operations would be necessary was predicated upon the fact that the disease was then far advanced.

40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Mr. Clancy: I object to that for the reason the doctor had already testified that if she didn't respond to rest in bed then either one or both of these operations might be necessary.

A No. Those operations are given in moderately advanced cases. 10

Q Let me ask you, doctor, whether you recall discussing the plate with Dr. Plank and you and he coming to the conclusion that a cavity existed.

Mr. Clancy: I object to the conclusion, the doctor testifying that Dr. Plank came to a conclusion.

Q I am trying to refresh your recollection of that. I only want the fact. A It was my opinion and his opinion— 20

Mr. Clancy: (Interrupting). I object to that and ask that be stricken out—my opinion and his opinion.

A (Continuing). I will say this: It was my opinion that this was in all probability a cavity. 30

Q Do you know whether anything was said on that occasion to indicate the size of it? 30

Mr. Clancy: I object to that for the reason if there was any indication of the size of it, it would indicate by the plate.

Mr. Unger: I am referring to the plate.

A That would be the only way of telling the size, and that was as obvious to Mr. Goldstein and Dr. Greifinger as to me. 40

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q Was it pointed out by anyone? A It was pointed out by me.

Q On the plate? A Yes.

Q Do you remember the area of it or size?

10 Mr. Clancy: My objection still goes to this question.

A Approximately an inch and a half to two inches by an inch.

Q To whom did you turn the plates over when you were finished with them? A I put them back in Dr. Mayer's X-ray file.

20 Q Do you know whether or not anything happened on that occasion to indicate whether Mr. Goldstein, the petitioner, had ever been informed of the condition of his wife?

Mr. Clancy: I object to that; in the first place, it is leading, and it calls for a conclusion.

A Mr. Goldstein expressed extreme surprise to me and to Dr. Greifinger that Mrs. Goldstein had tuberculosis.

30 Q Do you recall in what manner he expressed surprise? What did he say?

Mr. Clancy: I object to that for the same reason.

A He obviously—I don't recall his exact words, but he expressed considerable anger at Dr. Greifinger.

40 Q What was Dr. Greifinger's re-action in response to his expressions of anger? A Very little.

Exhibit P. 1. Deposition of Dr. Leetch, direct.

Q Did he make any explanation of the seeming lack of knowledge on the part of Goldstein as Goldstein expressed it?

Mr. Clancy: The same objection to that.

A No.

10

Q Did he say anything in contradiction of Goldstein's statement that he had not been apprised before that time?

Mr. Clancy: I object to that for the reason it is hearsay and not made in the presence of the defendant, and it calls for a conclusion.

A I don't recall.

Q You mean you don't recall that he said anything? A Yes.

20

Q And there is nothing that you recall that he did say? A No. My general impression of the whole conference was that Mr. Goldstein was doing most of the talking.

Q Was he charging Greifinger with a concealment of the condition of this girl?

Mr. Clancy: I object to this leading question, and I also object for the reason it calls for a conclusion and it is not binding on the defendant.

30

Q Did he say anything charging Greifinger with the concealment—

Mr. Clancy: (Interrupting). I object to that for the reason it is leading, calling for a conclusion and not binding on the defendant.

40

Exhibit P. 1. Deposition of Dr. Leetch, cross.

Mr. Unger: I withdraw the question.

Cross examination by Mr. Clancy.

10 Q When you went to see Mrs. Goldstein in 1924, while you went as a relief doctor for Dr. Mayer, you were for the purpose of those visits which you made her physician. A Yes, I presume so. May I explain how I happened to go?

20 Q Certainly. A And it may qualify a little of which you may be leading up to. This treatment of pneumo-thorax is one which is given on certain dates. If the patient is due say in a week or ten days for the injection, ordinarily it is better not to let it go over a day or two. If the patient's physician who has formerly given her the treatment is out of town for one or two days he usually gets some other doctor to give that treatment in his absence. It is purely a mechanical thing for the outside doctor. He has no judgment to use and he needs to know nothing about the case; he simply has to know how much air to inject into the chest, and that is all.

Q Did you know when Mrs. Goldstein had left Saranac after your visit in 1924? A No.

30 Q Did you know that she had left? A Yes.

Q Did you know whether any diagnosis had been made of her condition when she left? Yes or no. A Yes.

Q This calls for a yes or no answer, too. Did you know that she had left Saranac after her case had been diagnosed as an arrested case of tuberculosis; did you know that? A No.

Q You didn't treat her up to the time she left? A No.

40 Q Dr. Mayer was her physician? A Yes.

Exhibit P. 1. Deposition of Dr. Leetch, cross.

Q You are familiar, are you not, doctor, with the fact that tuberculosis may be arrested? A Yes.

Q And also with the fact that after an arrested state exists there may be a relapse? A Yes.

Q What may cause a relapse? A In the main, over-exertion; the patient's leading a life which over taxes the strength. Secondarily, accidental things may cause a relapse, such as having an acute disease, particularly respiratory attack, acute bronchitis or pneumonia or an accidental injury to the chest such as severe blows on the chest received in automobile accidents. 10

Q Influenza, a heavy so-called common cold? A Yes.

Q Could a relapse be caused by worry, nervous excitement? A Yes. 20

Q Could a relapse be caused by an over-indulgence in sexual intercourse? A Yes.

Q You say when you examined her in February, 1929, she was in a very nervous condition? A Yes.

Q Excitable condition? A I would say rather depressed.

Q You gave her a nerve sedative? A Yes.

Q And that was given, was it not, for the purpose of quieting her nerves? A Yes. 30

Q When you examined her at the Lynch cottage in February, 1929, you made the ordinary physical examination of the chest? A Yes, by tapping and using the stethoscope.

Q Did you get a history from her? A Yes, I did.

Q Could a relapse be caused by conduct on the part of a husband which rendered the patient highly nervous, excitable, by making charges that 40

Exhibit P. 1. Deposition of Dr. Leetch, cross.

the husband would get a divorce, berating the defendant for her condition, complaining that she was a drain on his resources, complaining that her condition interfered with his social activities by reason of the fact he couldn't stay out late at night, and the worry induced and the excitement induced by those causes of complaint? A That could cause a relapse.

10 Q Tuberculosis is an infectious and contagious disease, is it not, doctor? A Yes.

Q And it is more readily transmittable by infection and contagion rather than congenitally, isn't it? A Yes, and there is a very grave question that it is transmitted congenitally.

Q In your opinion, is it transmitted congenitally? A I would say that if it is transmitted
20 congenitally such cases are extremely rare.

Q Have you ever known of any in your experience? A No. The opinion that is held at present by most tuberculosis workers is that the only thing which may be hereditary is a susceptibility to tuberculosis. A vast mass of children of tuberculous parents who develop tuberculosis do so because they are subjected to massive infection in infancy, and were not born actually tuberculous.

30 Q And while there is a greater susceptibility to tuberculosis by children of tubercular parents, proper care and attention can allay the ravages of the disease? A Yes. I may say that it is not a certain thing that children of tuberculous parents are more susceptible to tuberculosis. Apparently a certain proportion of them are more susceptible to tuberculosis than those of non-tuberculous parents. But there is no hard and fast rule governing that.

40 Q But those cases are rare? A Which?

Exhibit P. 1. Deposition of Dr. Leetch, re-direct.

Q You say in those cases where children of tubercular parents are born tuberculosis is very rare. A Yes. They are so rare that I personally question whether they ever exist.

Q Does the fact that a child is born of a tubercular parent render that child any more immune, if there is such a thing, against tuberculosis? A That is a theory or an hypothesis that has been put forward by certain tuberculosis workers, that they are more immune. It is nothing but a theory. Observation leads us to believe that they are apt to be slightly less immune to tuberculosis than otherwise. 10

Q Your work is confined in a greater extent to the care and treatment of pulmonary tuberculosis? A Yes.

Q You do, I suppose, do you not, keep yourself informed on the current thought on that subject? A Yes. 20

Q Treatments? A Yes.

Q New ideas and developments? A Yes.

Re-direct examination by Mr. Unger.

Q You don't think this disease can be transmitted congenitally? A I don't believe so.

Q If it is not transmitted, isn't there a great danger that offspring would be predisposed to it? A Yes. 30

Q Did you receive from Mrs. Goldstein in 1929 a history of her case? A Yes.

Q Did she at that time say that she had indulged in any unusual sexual intercourse or had had any unusual excitement which had arisen from it? A No.

Q Did she say she had sustained any blow or injury to her body? A No. 40

Exhibit P. 1. Deposition of Dr. Leetch, re-direct.

Q Did she say that the conduct on the part of her husband had been bad and that he had berated her or that he complained that she had been interfering with his social obligations? A I don't recall that she did.

10 Q Did she make any complaint that any treatment on his part had in any way contributed to her then condition? A I don't recall that she did.

Q About as much as she had told you, she had done too much?

Mr. Clancy: I object to that. It calls for a conclusion.

20 Q I don't want you to tell me whether that is your conclusion; but I want you to tell me whether those were the words. A Yes. I can't say whether they were the words she used; but she told me in one way or another that she had been too active.

Q A general characterization? A Yes.

Q And you prescribed this medicine for her nerves just the same as you would have prescribed for another person's nerves, would you not? A Yes.

30 Q Did her nervousness appear to you to be any different than that which would exist in any person ordinarily?

Mr. Clancy: I object. It is leading and immaterial.

A No.

Q You said she was depressed? A Yes.

40 Q And I presume it is true, is it not, that most persons who come up here to be treated for this kind of disease are depressed?

Exhibit P. 1. Deposition of R. J. Plank, direct.

Mr. Clancy: I object; it is immaterial.

A Yes, many of them.

RUDOLPH J. PLANK, sworn by the Examiner. 10

Direct examination by Mr. Unger.

Q What is your profession, Mr. Plank? A X-ray technician.

Q By that you mean what? A Just taking these X-ray pictures.

Q How long have you been doing that work?

A About three years.

Q What has been your past experience? A Along these lines, nothing. 20

Q What have you been doing during these three years? A I have been taking pictures and giving reports on them to the doctors.

Q Do you specialize in pictures of any particular kind? A Chest.

Q And you have been doing that work for various physicians? A No; just for Dr. Mayer and Dr. Leetch.

Q These are what are commonly known as X-ray pictures? A X-ray pictures. 30

Q And the practise of Dr. Leetch and Dr. Mayer is principally with what—treatment— A (Interrupting). Of tuberculosis.

Q —of tuberculosis? Have you a record of any X-ray pictures which you made of Mrs. Regina Goldstein? A Yes.

Q Is that record in your writing? A Yes.

Q Will you produce it? A Yes.

Q Will you tell us the earliest record which you have? A On March 28th, 1929, I took a pic- 40

Exhibit P. 1. Deposition of R. J. Plank, direct.

ture of Mrs. Regina Goldstein. I took plates No. 2796, chest plates.

Q You made those yourself? A I took the pictures, yes.

Q Where was she at the time? A She must have been here.

10 Q In the laboratory here? A Yes, sure.

Q After you took the plate what became of it? A I gave it to Dr. Mayer and I showed it also to Dr. Leetch.

Q Before you gave it to Dr. Mayer did you identify the plate by placing anything on it? A Well, the number is indented at the time I took the plate.

Q You mean that number is put on? A The number is put on with leaden numbers and the X-ray doesn't penetrate, so the plate reads with this number on the plate.

20 Q What number is that? A 2796.

Q And that appeared on the plate before you delivered it to Dr. Mayer? A Yes.

Q Was there anything else on the plate which identified it as being an X-ray of any particular person? A No, just the number.

Q Did the name of Mrs. Goldstein appear on it? A No, just the number.

30 Q When next did you take a picture? A July 11th, according to my records. This is not in my handwriting. This happens to be in Jack's. This is my book, my appointment book.

Q Made under your supervision? A Yes.

Q What picture did you take at that time? A 3136, also of the chest.

Q Do you recall the incident? A No, I don't recall the incident.

40 Q You know it by reference to your book? A I know it, yes, and I know it by checking up the two X-rays.

Exhibit P. 1. Deposition of R. J. Plank, direct.

Q Was that plate identified the same way, by the number being put on it? A By the number, yes.

Q What became of that plate afterwards? A I showed it to Dr. Mayer and put it back into my records, into my file. The other one was also put in my file. 10

Q Both plates were returned to your files? A Yes.

Q Did they remain here? A For awhile, yes.

Q Until when? A The first time I recall them being taken away was to be taken to Dr. Brown's office. I don't recall what date; I haven't any record of that.

Q Were they brought back? A They were brought back.

Q Eventually what became of the plates? A They were sent to Dr. Ornstein at the patient's request. 20

Q You mean Mrs. Goldstein. A Mrs. Goldstein.

Q Did she make that request to you? A Yes.

Q You complied with it? A Yes.

Q And you sent both of them to Dr. Ornstein?

A I did.

Q Of New York City? A Yes.

Q Do you know Dr. Ornstein? A I know Dr. Ornstein, yes. 30

Q Did you meet him in connection with this case? A No.

Q How extensive has been your work in connection with the making of these X-ray pictures—by that I mean, how many have you taken during the three years? A Oh, about 2800—2800, 3,000.

Q You took it very extensively? A Yes. I guess I have completed about three thousand, thirty-five hundred. 40

Exhibit P. 1. Deposition of R. J. Plank, direct.

Q And you consider yourself experienced in that line? A Yes.

Q Based upon that number of pictures? A Yes.

Q Can you read these pictures? A No.

10 Q Do I make myself clear? What I mean to ask you is whether or not you are able to explain them after they are made? Can you tell what they disclose? A I can explain them after they are made. I can explain the shadows. The interpretation of those shadows rests with the physician.

Q Did you examine these plates? A Yes, I examined the plates.

Q Will you tell us what they showed?

20 Mr. Clancy: I object first for the reason that the witness is not properly qualified to testify as to what the X-ray plates showed.

A From recollection, not from any record. The left chest was almost completely obliterated due to a homogenous shadow.

30 Mr. Clancy: I ask to have that stricken out for the reason that the witness is not qualified to testify because he is an X-ray technician and not qualified to testify to what they show, and for the reason that the plates themselves are the best evidence, and it is a conclusion of the witness.

40 Mr. Unger: I agree with you that the plates are the best evidence, but they are now shown to be in the possession of a physician of the defendant, and the witness is only testifying as to what they showed and not as to any disease.

Exhibit P. 1. Deposition of R. J. Plank, direct.

Q Is your testimony directed to both plates?

A Yes.

Mr. Clancy: The same objection to the testimony about these plates without specifically objecting each time.

10

Q Is there any difference between what is shown by the plate of July 11th, 1929, and that shown on March 28th, 1929, do you remember?

A Not grossly; to my recollection, no gross change.

Q On any other occasion were you present at a conference when Dr. Leetch was present and which had to do with the case of Mrs. Goldstein?

A Yes.

Q Can you fix that time? A No.

20

Q Was it this year? A Yes.

Q Do you know what part of the year? A No. It must have been either after or just prior to March 29th, the date of the first picture.

Q Do you recall what the occasion was for that conference, what was done, what transpired at it? A No.

Q Do you remember that there was one? A Between Dr. Leetch and myself, yes.

Q Did you and Dr. Leetch go over any X-ray pictures on that occasion? A Yes.

30

Q Do you happen to remember what they disclosed at this time? A No.

Q Do you know whether those X-ray pictures which you went over with Dr. Leetch were the two about which you already testified or other ones? A I don't know.

Q Bearing in mind that these plates were made in March and in July? A I don't know. If you fix the date of it, perhaps.

40

Exhibit P. 1. Deposition of R. J. Plank, direct.

Q You can't fix it? A No.

Q Do you recall whether or not it was in February of this year? A No.

Q You don't remember. There was such an occasion, was there? A Yes.

10 Q Do you remember the season of the year?

A I can recollect it was still snow.

Q Winter? A I believe so, winter, yes.

Q Do you know what time it was with relation to Washington's Birthday? A No.

Q Can you say whether or not it was in the month of February? A No.

Q You know it was in the winter months. A I know it was in the winter months.

20 Q Do you recall now whether the plates which were gone into on that occasion were the plates that you had made or other plates? A No, I don't recall.

Q Do you know whether or not they were plates which were made by Dr. Ornstein? A I don't recall the plates at all.

Q Do you recall ever having mailed to Dr. Ornstein any plates other than the two plates 2796 and 3136, which you made? A I don't recall the actual mailing of them, no.

30 Q Or any other plates which you state— A Yes, I recall Dr. Mayer requested them and that we couldn't find them here, and inasmuch as we didn't find them and the patient said they were here, they must have been sent back to Dr. Ornstein.

Q Do you remember Mr. Goldstein taking up that question with you last July? A Yes.

Q And making inquiry as to what had become of the Ornstein plates? A Yes.

40 Q And you told him at that time that they had gone back to Dr. Ornstein.

Exhibit P. 1. Deposition of R. J. Plank, direct.

Mr. Clancy: I object first because it is leading, and, second, because it is hearsay, not binding on the defendant and not in the presence of the defendant.

A Yes.

Q Is that your recollection of what happened to them? A Yes. 10

Q And those are the plates which are different and distinct from the two plates 2796 and 3136? A Yes.

Q Having that in mind, Mr. Plank, do you now recall specifically having gone over these other plates with Dr. Leetch? A No.

Q That doesn't bring it to you? A No.

Q I suppose you read a great many plates?

A Yes, both inside and outside. 20

Q And that doesn't stand out in your mind more than any other? A No.

Mr. Clancy: No cross examination.

30

40

Exhibit P. 1. Stipulation.

IN CHANCERY OF NEW JERSEY.

7800.

Between

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GUSTAVE L. GOLDSTEIN,

*Petitioner,**and*REGINA GREIFINGER, *Otherwise*

REGINA GOLDSTEIN,

*Defendant.**On Petition.**Stipulation.*

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It is hereby stipulated by and between the parties hereto by their respective solicitors, that the petitioner have leave to take *de bene esse* without order of the Court, the testimony of Dr. Henry Leetch, 108 Main street, Saranac Lake, New York; Dr. Lawrason Brown, 108 Main street, Saranac Lake, New York, and Rudolph Plank, 108 Main street, Saranac Lake, New York, or any one of them, at Saranac Lake, New York, on September 6th, 1929, at ten o'clock in the forenoon at the office of Hotel Saranac, Saranac Lake, New York, before Herman Winard, Supreme Court Examiner, which said testimony shall be taken stenographically before the said examiner and said stenographer shall make two transcripts of said testimony which shall be sworn, but need not be subscribed to before said officer, and one transcript shall be delivered to the defendant or her solicitor and the other to the petitioner or his solicitor; that either party may use the testimony so taken at the trial of said cause in the same manner and with the same force and effect as if said testimony had been taken

Exhibit P. 1. Stipulation.

under a commission duly issued by the Court on application therefor under the Evidence Act of the State of New Jersey to take *de bene esse* the testimony of said witnesses, and it is further stipulated and agreed that the defendant may attend and cross-examine the said witnesses and that all objections to testimony or evidence shall be noted and shall be referred to the trial court for its ruling as to the admissibility of such testimony, but that the examiner shall take such testimony subject to such objection. 10

It is further stipulated that the defendant may take depositions of witnesses on her behalf with the privilege of cross examination, and that the said examiner shall have the power and authority to adjourn the taking of said depositions on notice to the parties. 20

Dated August 22, 1929.

MILTON M. UNGER,
Solicitor of Petitioner.

MERRITT LANE,
Solicitor of Defendant.

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EXHIBIT P. 2.

IN CHANCERY OF NEW JERSEY.

73—16.

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Between

GUSTAVE L. GOLDSTEIN,

*Petitioner,**and*

REGINA GREIFINGER, otherwise

REGINA GOLDSTEIN,

*Defendant,**On Bill, &c.**Interrogatories.*

20

To Merritt Lane, Esq., Solicitor of the Defendant.

SIR:—

PLEASE TAKE NOTICE, that petitioner requires answers under oath, from the defendant, to the following interrogatories, material to the issue.

MILTON M. UNGER,
Solicitor of Petitioner.

30

INTERROGATORIES.

1. As nearly as possible, what is the exact date when you were first attacked by tuberculosis?

ANSWER:—June 1923 as nearly as I can remember.

2. What is the name and address of the doctor who first diagnosed this first attack as tuberculosis?

40

Exhibit P. 2. Interrogatories and Answers.

ANSWER:—Marcus H. Greifinger, my brother, who was a medical student at that time, and Dr. Geo. G. Onstein.

3. What are the names and addresses of every physician who attended you during this attack and treated you for tuberculosis?

ANSWER:—Dr. Geo. G. Onstein, 150 W. 55th Street, New York City.

10

4. How long were you ill from your first attack of tuberculosis?

ANSWER:—About six months.

5 (a) During this first attack, were you confined to your home? ANSWER:—

(b) If so, how long?

ANSWER:—(a) Yes; (b) A few months.

20

6. (a) During this first attack, were you confined to any institution, sanitarium, nursing cottage or any other place other than your home?

ANSWER:—(a) Yes. (b) Saranac Lake, Miss Hayes Cottage. Dr. Edgar Mayer, Saranac Lake, N. Y.

(b) If so, state fully when and where, and the names and addresses of the physicians who attended you at these different places.

ANSWER:—(b) Dr. Edgar Mayer, Saranac Lake, N. Y.

30

7. During this first attack, were any x rays of the parts of your body affected by tuberculosis taken, and if so, what are the names and addresses of the persons or physicians who took the x rays?

ANSWER:—Yes. Dr. Edgar Mayer.

8. (a) Have you these x rays? ANSWER:—

No.

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Exhibit P. 2. Interrogatories and Answers.

(b) If not, who has them? Believe they are destroyed.

ANSWER:—

9. What parts of your body were affected by this first attack of tuberculosis?

10 ANSWER:—Left lung.

10. (a) After this first attack of tuberculosis, were you pronounced “cured”?

Answer:—Yes.

(b) If so, what are the names and addresses of the physicians who so pronounced you “cured”?

ANSWER:—Dr. Onstein, Dr. Mayer.

20 11. (a) At the time you were advised that you were “cured” was the meaning of the word “cured” as used in connection with tuberculosis explained to you?

ANSWER:—Yes.

(b) If so, what explanation thereof was given to you by each of the physicians who advised you that you were “cured” naming the particular physicians, their addresses, and their advices.

30 ANSWER:* The explanation was that I had an arrested case and that if I did not overexert myself, the disease would not progress.

12. (a) Did any of these physicians who treated you for this first attack of tuberculosis warn you as to the dangers or inadvisability of marrying in view of your tubercular condition?

ANSWER:—No.

40 (b) If so, what are the names and addresses of the physicians that so warned you, naming the particular physicians and the warnings that each of them gave you?

ANSWER:—Not required.

Exhibit P. 2. Interrogatories and Answers.

13. (a) After the first attack, did you suffer any other attacks other than your present attack from which you now suffer?

ANSWER:—No.

(b) If so, what are the dates of each attack and give in detail the name and address of each physician who treated you during each attack, specifying them for each respective attack. Also state whether on each attack you were confined to your home or to any institution, sanitarium, nursing cottage or other place, other than your home, specifying in each instance the different respective attacks to which your answer to this question applies.

10

ANSWER:—Not required.

14. On each of these subsequent attacks, were x rays of the affected parts of your body taken and specify to which attacks these x rays apply?

20

ANSWER:—Not required.

15. On these different attacks, specify on each attack, what parts of your body were affected by your tubercular condition?

ANSWER:—Not required.

16. What are the names and addresses of the persons or physicians under whose direction and supervision these respective xrays were taken?

30

ANSWER:—Not required.

17. (a) Have you these xrays? ANSWER:—Not required.

(b) Who has them?

ANSWER:—Not required.

18. After each of these subsequent attacks, were you pronounced "cured" specifying from

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Exhibit P. 2. Interrogatories and Answers.

which of these attacks you were pronounced "cured."

ANSWER:—Not required.

- 10 19. If you were pronounced "cured" on any of the attacks mentioned in your answer to question 13, what are the names and addresses of the physician or physicians who so pronounced you "cured"?

ANSWER:—Not required.

20. I If your answer to the preceding question discloses that any physicians so pronounced you "cured", what explanation of the word "cured" did they give you in connection with your tubercular condition, stating in detail the explanation given you by each of the said physicians.

- 20 ANSWER:—Not required.

21. (a) Which, if any, of these physicians who treated you on these attacks warned you as to the dangers or inadvisability of marrying in view of your tubercular condition?

ANSWER:—Not required.

(b) Specify the names and addresses of each physician who so warned you and what warning each of the said physicians gave you.

- 30 ANSWER:— _____

22. Did you attend Brown University, and if so when and between what dates?

ANSWER:—Yes. 1921-1922, 1923.

23. While at Brown University, did you ever suffer from any attack of tuberculosis and if so, which of the above attacks aforementioned was this attack?

- 40 ANSWER:—I do not know. The diagnosis was made upon my return from University, June, 1923.

Exhibit P. 2. Interrogatories and Answers.

24 Were you obliged to leave Brown University because of any such attacks, and if so, which of the above attacks?

ANSWER:—No. I left after the close of the school year June 1923.

25. (a) Did you graduate from Brown University? 10

ANSWER:—No.

(b) If not, why not?

ANSWER:—Because I never completed the four year course.

26. Were you unable to continue at Brown University because of any of the attacks aforementioned?

ANSWER:—I was advised to remain away from school and did so. 20

27. If your answer to the preceding question is yes, specify which of the aforementioned attacks.

ANSWER:—There was but one attack before the present one.

28. During your present illness, what are the names and addresses of each physician who treated or attended you for your tubercular condition? 30

ANSWER:—Dr. Ornstein, Dr. Mayer, Dr. Greifinger.

29. During your present illness, when were you first advised that you were suffering from tuberculosis again and what are the names and addresses of the physicians who so advised you?

ANSWER:—About Christmas, 1928, Dr. Ornstein,

30. Have you ever been advised or informed by any physician whether your tubercular condi- 40

Exhibit P. 2. Interrogatories and Answers.

tion is chronic, congenital or otherwise, and if so, how has your tubercular condition been classified in this connection?

ANSWER:—No, never advised.

10 31. What parts of your body during each attack from which you have suffered from the time you were first afflicted with tuberculosis up to and including the present attack, were affected by this disease, specifying the particular parts affected during each attack and the nature and extent of the said infections.

ANSWER:—Left lung.

32. Has any other member of your immediate family had tuberculosis, and if so whom?

ANSWER:—No.

20 33. Has any other member of your family related to you within third degrees had tuberculosis, and if so, who?

ANSWER:—No.

30 34. Aside from the medical attention you received during the aforementioned attacks, state in detail each occasion that you have received medical attention or examinations from the time of your first attack until the present date, specifying the purpose of your visit to the physician or physicians, the diagnosis and the results thereof.

ANSWER:—I have never received any treatment; I have been examined by Dr. Ornstein every six months. I was examined by Dr. Joseph Echikson, before marriage, and found in excellent condition.

40 35. Aside from the x rays which you have had taken of you during the aforementioned attacks, state each and every occasion on which you have had other x rays taken of your body, whether of

Exhibit P. 2. Interrogatories and Answers.

the parts affected by your tubercular condition or otherwise, and state the purpose for which the said x rays were taken, the explanation and results thereof, setting forth also the names and addresses of the different physicians who took these x rays and the dates upon which the same were taken.

10

ANSWER:—Had fluoroscopic examination made from time to time by Dr. Ornstein, but no plates exist. I do not know the dates.

36. Prior to your marriage with the petitioner, did you consult any physicians who were already familiar with the fact that you had, prior thereto, been afflicted with tuberculosis as to the advisability of your marrying the petitioner within a short time thereafter, and if so, state the names and addresses of each physician whom you so consulted and their advices to you.

20

ANSWER:—Dr. Ornstein, Dr. Echikson, Dr. Greifinger all informed me that there was no objection whatever to my marriage.

37. Did Dr. Marcus Greifinger ever treat or attend you for tuberculosis and if so, state fully all the particulars of the medical attention, treatment and advice he gave you, setting forth the dates when he so treated you or attended you and when you were last examined by him prior to your marriage to the petitioner. Also state the dates when you were examined by him subsequent to your marriage and up until the present date.

30

ANSWER:—Yes. Impossible to give dates; examined me before my engagement and before my marriage, and at times throughout the entire period.

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Exhibit P. 2. Interrogatories and Answers.

38. Before your marriage to the petitioner, did you ever ask Dr. Greifinger whether it was advisable for you to marry the petitioner and if so, what did he advise and tell you?

ANSWER:—I was informed by Dr. Greifinger that there was no objection to my marriage by
10 reason of my former attack of tuberculosis.

39. Did Dr. George Ornstein ever treat or attend you for tuberculosis and if so, state fully all the particulars of the medical attention, treatment and advice he gave you, setting forth the dates when he so treated you or attended you, and when you were last examined by him prior to your marriage to the petitioner. Also state the dates when you were examined by him subsequent to your marriage and up until the present
20 date.

ANSWER:—Yes. Do not know dates; examined about two days after my engagement by Dr. Ornstein. I was examined about two weeks before marriage; after marriage, September 28, 1928. I was advised to go to Lakewood in November, 1928 and went with my husband. I stayed about a month and then came home and rested the afternoons under the advice of Dr. Ornstein.

30 40. Before your marriage to the petitioner, did you ever ask Dr. Ornstein whether it was advisable for you to marry the petitioner and if so, what did he advise and tell you?

ANSWER:—Yes. He told me there was no objection to my marriage.

41. From which physician or physicians are you now receiving medical treatment and attention, stating their names and addresses.

40 ANSWER:—None.

Exhibit P. 2. Interrogatories and Answers.

42. When, prior to your marriage, were you last examined by a physician; what necessitated the same; what was the purpose of the examination; what, were you informed, was the result of the examination; what treatment or medical advice, if any, was given to you; where did the examination take place; by whom; were any x rays taken of you at the said examination; who has the said xrays; who took the said xrays and what explanation of the same was given to you? 10

ANSWER:—About two weeks before my marriage by Dr. Ornstein, merely to satisfy myself that there was no reason why I should not get married. No X-rays were taken. I was informed that there was no objection whatever.

43. Referring to Paragraph Four of your answer, wherein you say “that petitioner had full and complete knowledge of the situation” state specifically what you mean by the word “situation” that is, whether you mean that the petitioner had knowledge of your tubercular condition or of the “cold in February of 1928.” 20

ANSWER:—Of the tubercular condition.

44. Referring to the same Paragraph Four, wherein you allege that the petitioner “Had full and complete knowledge” state how you know if the petitioner had such full and complete knowledge. Do you allege that you gave petitioner such knowledge, and if so, was it orally or in writing, and at what time or times, place or places was such knowledge given? Also state as nearly as you can recollect, the substance of any words or statements uttered by you to the petitioner, which words or statements you allege resulted in the petitioner’s knowledge of your condition. 30
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Exhibit P. 2. Interrogatories and Answers.

ANSWER:—I gave petitioner such knowledge orally before our engagement in my home and again at the time of our engagement and Dr. Ornstein also informed petitioner before my marriage to him. Petitioner was informed by the three of us that I had an arrested case of tuberculosis and if I did not over exert myself the disease would not progress but would remain arrested.

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45. IF you say that the petitioner's knowledge of your condition was the result of anything else besides that contained in the preceding question, state how you know that the petitioner's knowledge was the result of such other fact or facts; and specify what such other fact or facts were, giving such details as the respective dates and places; and if such other fact or facts have reference to words or statements made by someone other than you, give the name or names of such persons; and if such words or statements were uttered in your presence, give such details as dates and places, and as nearly as you can recollect the substance of such words or statements.

ANSWER:—Not required.

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Exhibit P. 2. Interrogatories and Answers.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

REGINA GOLDSTEIN, being duly sworn according to law on her oath deposes and says:

I am the defendant in the above entitled cause, and the answers to the Interrogatories herein set forth are true. 10

REGINA GOLDSTEIN.

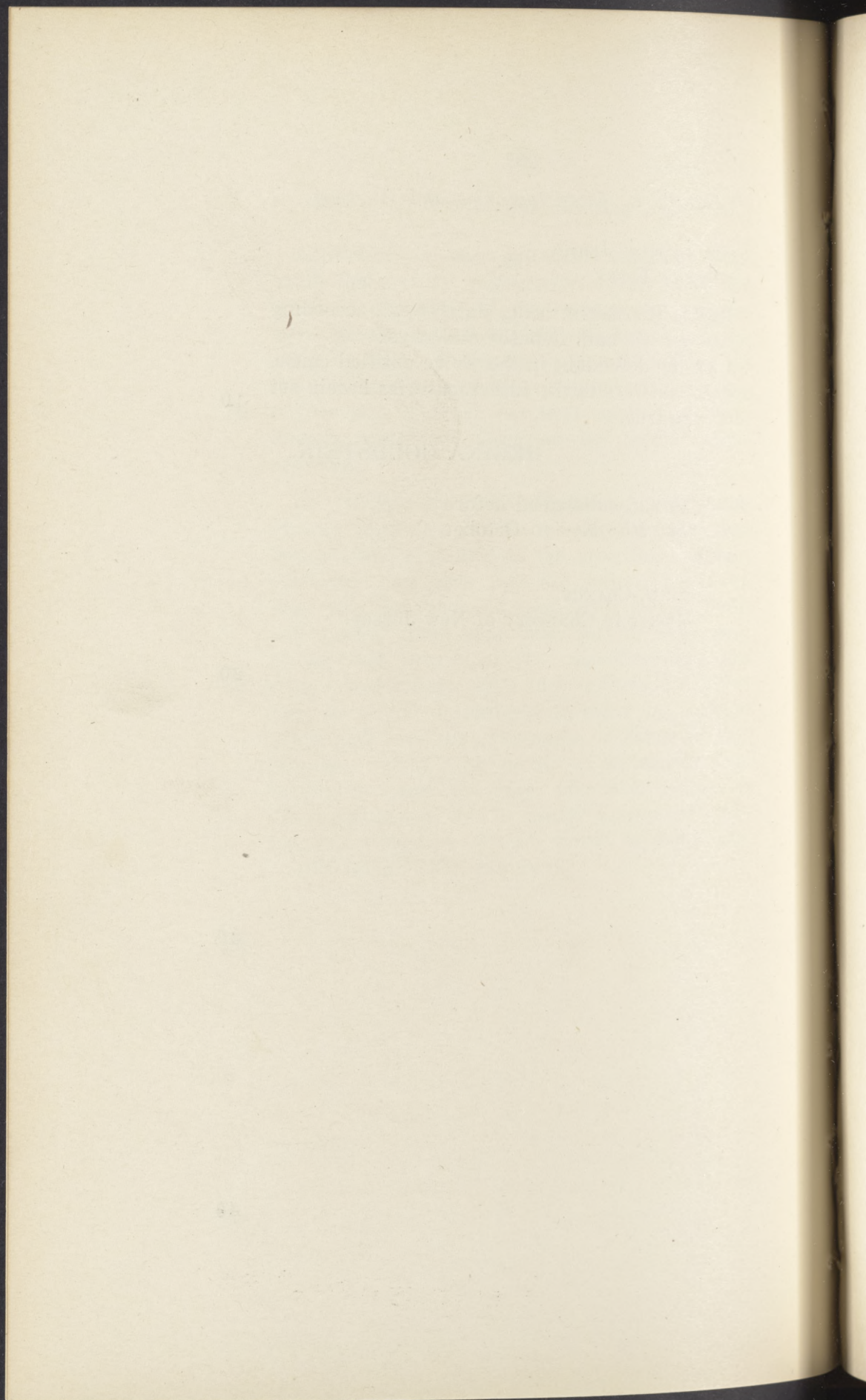
Sworn to and subscribed before me this 8th day of October 1929.

JOHN S. CLANCY,
 Master in Chancery of New Jersey.

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New Jersey Court of Errors and Appeals

GUSTAVE L. GOLDSTEIN,
Petitioner-Appellant,

vs.

REGINA GREIFINGER, otherwise
REGINA GOLDSTEIN,
Defendant-Respondent.

*On Appeal
from Court
of Chancery.*

CHURCH,
V.-C.

BRIEF ON BEHALF OF PETITIONER-APPELLANT.

This is an appeal from the decree of the Court of Chancery made on the advice of Vice-Chancellor Church, dismissing the petitioner's petition.

The petition was filed to secure a decree nullifying the marriage between the petitioner and the defendant because of the concealment of the defendant of the fact that she was afflicted with tuberculosis at the time of the marriage, the petitioner averring no knowledge on his part and the concealment by the defendant of this fact. The answer admits that the defendant was afflicted with tuberculosis prior to the marriage, but alleges that she had been cured and that the petitioner had full and complete knowledge of the situation before the marriage, and that the defendant concealed nothing from him. The Court dismissed the petition upon the merits and this appeal is taken.

The grounds of appeal are found on pages 9 and 10 of the State of the Case. By them the petitioner contends that the Court was in error in failing to find that he was entitled to a decree; that the Court erred in refusing and fail-

ing to find that defendant was chargeable with fraud entitling the petitioner to the annulment of the supposed marriage, and that the Court erred in finding that the petitioner did not corroborate his cause of action.

The Facts.

The undisputed facts developed at the trial of this cause are these: The petitioner met the defendant, through a casual introduction, during the summer of 1927. The next time he met her was in October, 1927, after which time he saw her several times a week. On December 22, 1927, he *BECAME ENGAGED* to the defendant. *FORMAL ANNOUNCEMENT* of the engagement was made on February 4, 1928, at which time he gave her a diamond engagement ring of the value of at least \$1,500.00. On June 24, 1928, they were married. During the latter part of January, 1928, and the early part of February, 1928, within which time formal announcement of the engagement was made, the defendant suffered from a severe cold and was confined to bed during the said illness. The *UNDISPUTED* testimony of all the witnesses who testified both on behalf of the petitioner and the defendant, and particularly that of Dr. George Ornstein, a licensed physician of New York State, is that her illness was then diagnosed as a severe cold and that the petitioner was then told by the defendant and by Dr. Greifinger and Dr. Ornstein, that she was suffering from a cold. This incident will be referred to later. After her recovery from this illness and up until June 24, 1928, the date when the parties were married, she apparently enjoyed the best health and was not ill during that period. She continued to enjoy this apparent good health and suffered

from no illness until the latter part of September or the early part of October, 1928, which was about two or three months after their marriage. After their marriage the parties went on a honeymoon which carried them through the northern part of New York State, through eastern and midwestern Canada and through the Middle West of the United States. Notwithstanding the rigorous traveling, the defendant apparently was still in the best health and continued so after the return from the honeymoon and up until the commencement of this illness which commenced in September, 1928. The *UNDISPUTED* testimony further shows that from September, 1928, when this illness commenced and at least, according to the defendant's testimony, the latter part of December, 1928, petitioner was informed that this new illness was diagnosed as acute bronchitis, and the petitioner was informed by the defendant and her brother, a physician, that her then illness was acute bronchitis. As will be shown later, the petitioner contends that as late as February 24, 1929, he was informed by the defendant, her brother and Dr. George Ornstein, a New York physician who attended the defendant, these being the only witnesses who testified for the defendant at the trial of this cause, that her illness was acute bronchitis. This last-mentioned date is important because it was on this date that the petitioner contends he was informed for the first time by any physician who had actually examined the defendant, that she was suffering from chronic tuberculosis. The *UNDISPUTED* facts further show that sometime during the latter part of the year of 1923, and throughout most of the year of 1924, the defendant suffered from an attack of tuberculosis. During that illness, she

was obliged to go to Saranac Lake, New York, a colony for tubercular patients seeking recovery. After she had been there until the middle of 1924 and undergone different treatments there, she returned to Newark, from which time and until the commencement of the illness in September, 1928, she had had no recurrence of tuberculosis and during which time her condition would probably fall under the classification of what is known as an "arrested" case of tuberculosis. The testimony of the different physicians who testified at the trial, was to the effect that one is never "cured" from tuberculosis but that if one is free from constitutional symptoms for a period of several years after an attack, the disease is said to be "arrested"; a recurrence of the disease being ever probable. The testimony also shows that from the time of her return to Newark in 1924, and until the commencement of her illness in September, 1929, she was periodically examined by Dr. Ornstein at intervals of about six months apart, the object of the examination being to note whether or not the disease had progressed or whether she had improved, and that during these examinations, X-rays were taken of the infected areas. As stated at the outset, all of the aforementioned facts are undisputed, and are developed from the testimony of the witnesses that testified for both sides.

The Issue.

The petitioner contends that he learned that the defendant had tuberculosis for the first time on February 24, 1929, which was about eight months after their marriage, the circumstances being these: After the illness of the defendant which commenced in September, 1928, the de-

fendant was confined to bed, under the care of her brother, Dr. Greifinger, who was and is a duly licensed physician of New Jersey. From time to time, when he inquired of the defendant and Dr. Greifinger as to what ailed her, he was informed that she was suffering from an acute attack of bronchitis. During this illness, she was also examined by Dr. Ornstein at the latter's office in New York but not in the presence of petitioner and on her return, she informed the petitioner that Dr. Ornstein likewise had diagnosed her case as that of acute bronchitis and stated that she would be well in a very short time. He advised her to go to Lakewood, New Jersey, for a short stay and the undisputed testimony is that during the month of October, 1928, she went to Lakewood, New Jersey, for one week, after which, according to the petitioner, she returned and stated (Case p. 21): "Well, dear, I am all well and we are ready to go (housekeeping) now." The *UNDISPUTED* testimony also shows that for several weeks thereafter, she was not confined to bed but made social visits, attended social functions and even visited the petitioner's brother in Asbury Park. Several weeks after her return from Lakewood, she was again taken ill and confined to bed. This bronchial condition continued up until about Thanksgiving Day. Petitioner testified that on Thanksgiving eve, a fraternity to which he belonged, conducted its annual dance. The defendant seemed to feel that the petitioner was very anxious to attend this affair and although he tried to make clear that in view of her condition, he did not think she ought to go to the dance, she seemed to be so insistent that he said, "Well, I will go. Ask your brother and if he says you can go, we will go to the dance"

(Case, p. 23). The petitioner called her brother into the room and asked him whether she was well enough to attend the dance and, according to the petitioner, he stated, "Of course. There is nothing the matter with her. She can go to the dance" (Case, p. 23). They attended the dance and the day after the dance, the defendant became very ill. She developed a very violent cough. She then informed petitioner that she had had a menstrual period at that time and although her temperature was 99 or 99½ on the day of the dance she had run a fever of 100, and that on Thanksgiving Day, a day after, her fever ran even higher, whereupon the petitioner reprimanded her for having failed to call this condition to his attention. From that time on her illness continued to grow worse. Prior to this incident of the dance, the petitioner testified that his mother and sister had called to see the defendant at intervals of about once a week and sometimes oftener and that on each occasion when they inquired of her and her brother as to her health, they were informed that she had a cold and bronchitis and that there was nothing serious the matter with her. Under this belief, the petitioner's mother suggested some home remedies for a cold or bronchial condition, such as taking olive oil or putting some lard on the chest, or some other home remedies, and to which suggestions Dr. Greifinger responded that it could do no harm, possibly some good, and that she might try these remedies. Pursuant to these suggestions, she did start taking olive oil.

After the dance, her condition continued to grow worse daily. The defendant would then wake up in the morning with coughing spells that were so violent in their nature that she would almost convulse. She seemed to be bringing up

a large amount of sputum and she seemed to be having a persistent run of fever. She had difficulty in holding her food. Very often, after she would eat, she would get a spell of vomiting, throwing up all her food. After the dance, and after she had become seriously ill, she contended that her condition was due and had arisen from the dance. The petitioner testified as follows (Case, p. 26):

“Q Now, during that time did she make any reference to where or when her illness had started? A Why, she said, well, she said, ‘I should never have gone to that dance. This cold has got me right.’ And she seemed to feel that her illness, that is, she expressed herself that her illness from that time on was due to the cold that she caught at the dance.”

The petitioner testified that it was the custom of the defendant to retire to bed about nine o'clock whereupon he would go downstairs and read for an hour or two and then he would come up and retire to bed. About a week or so after Thanksgiving, an incident happened which reads as follows (Case, p. 25):

“Q Now, did you have a talk with her about that time as to what the matter was with her on any occasion? A About a week or so after Thanksgiving, it was her custom—it had been her custom to retire to bed about nine o'clock; after she would retire to bed, I would go downstairs and read for an hour or two and then come up and retire myself; I came up to the room and I had undressed and was going to bed when I heard someone sobbing. The sobbing was quite audible. I asked Reggy whether she was crying and she just moaned. I went into bed with her and asked her what she was crying about. She told me—‘Gee,’ she said, ‘I am so terribly sick,’ she said, ‘I should have never dragged you into this.’

She said, 'I should have told you before I married you that I was sick.' I said, 'Well, I know you were sick, I know you had that cold in February.' I said, 'That is nothing bad, there is nothing terrible about that,' that was all she said.

Q She mentioned to you that she had been suffering from tuberculosis? A Not the word.

Q Did she mention that word, or consumption, or anything like that? A Never.

Q And did you at that time suspect that she had it? A Not at that time."

The petitioner further testified that around the first week of December, 1928, they ceased sexual relations because, as he states (Case, p. 26):

"Q Did you continue sexual relations with her? A Why, around the first week of December, it rather struck me, as a layman, that perhaps it was inadvisable to have intercourse, she seemed to be so terribly sick. Prior to Thanksgiving Day it appeared to me as if she was only moderately ill; now she seemed to be so very ill; I suggested to her perhaps it would be best for us to stop having intercourse, perhaps it was harmful to her, and she acquiesced in that suggestion, and from that time on we never had intercourse."

The fact is undisputed that they ceased these sexual relations in December, 1928.

About this time, another incident happened, to which the petitioner testified as follows (Case, p. 27):

"A Around the first week in December, Reggy had made some wise little remark, or a clever, witty remark and I suggested to her mother, 'Well, that is what they learn at college.'

Q You said what? A I said, 'That is what they learn at college, probably got that at Brown.' And her mother said, 'Yes, that

is where this whole business started, at Brown.'

Q That was in December, 1928? A That is right."

The petitioner then testified that about this time he began to feel that although the doctors she was using might be good and satisfactory, apparently they were not making any headway with her illness and he suggested to her that they call a Dr. Fuerstman who was the uncle of petitioner's brother, by marriage. The defendant vigorously refused to be examined by Dr. Fuerstman and she and her brother scouted the idea, stating that Dr. Ornstein was a very good man and could very well handle the situation. The petitioner testified that thereafter, he felt that after all her brother was a doctor, she was probably as dear to him as she was to the petitioner, and he undoubtedly had her interest at heart and with that thought in mind, he permitted the same doctors to treat her. After several weeks went by and she seemed to make no headway, he become very persistent in his demand that she should have another doctor and he told them that this time he wanted to use a Dr. Polevski. The petitioner's testimony about this incident, was as follows (Case, p. 28):

"A My wife and Dr. Greifinger, they both laughed at the idea, the idea of using Dr. Polevski, but, as a result of my persistent demand, Dr. Polevski did call upon her and did examine her. As I recall, he examined her either on a Saturday or some day prior to a holiday, because my office was closed the following day. Dr. Polevski had called at the home to examine her. When I returned from my office that day, I asked Reggy what Dr. Polevski said and she told me, she says, 'I must be terribly sick.' And I asked her what made her think so and she said, 'Well, when Marcus came in— (interrupted).

Q Who is Marcus? A Meaning her brother, the doctor, 'When Marcus came in he was white as a ghost,' she said, 'I must be very sick.' So I said, 'What did he say?' 'Well, he seems to think I have got bronchitis or the same thing,' she said, 'Practically the same thing that Dr. Ornstein said, but he says he will have to examine me, he wants to take an X-ray of me.' The following day, which was either a holiday or a Sunday, I don't recall which, she went down with her brother to Dr. Polevski's office and when they returned I asked them what he stated. Her brother said, 'Why that fellow is nothing but a shoemaker. Took red pencils and blue pencils and marked up her chest and her back in an attempt to diagnose her, but,' he said, 'he did reach the same result that Dr. Ornstein reached.' I said, 'What is that?' 'Why, she has an attack of bronchitis.' She continued to be ill after that and seemed to be making no progress and I told her brother that I was beginning to suspect there was something wrong. I told him that I wanted to engage my own doctor from now on, I wanted to get a doctor that would be responsible to me for the result, and I went down to see Dr. Fuerstman, who was an uncle of my brother's by matrimony and I told Dr. Fuerstman—

At this point, objection was made to this conversation with Dr. Fuerstman, but on cross examination, the petitioner continued the same as follows (Case, p. 76):

"A Those things were these: Some time, either shortly prior to Dr. Polevski's visit to my wife, or afterwards, I went to see Dr. Fuerstman and I asked him—I told him about the nature of my wife's illness, I described the symptoms to him and I told him I wanted him to give me the name of a specialist that I wanted to call for the purpose of making an examination of her, that

I was not satisfied with the progress she was making with the physicians under whose care she was at that time. I described the symptoms to him as accurately and as clearly as I could from my observations as a layman. After I got through he told me, 'Gus, there is no use of your going to see any specialist,' he says, 'I can almost tell you, as painful as it is for me to tell you, that your wife has t.b.' I said, 'Well,' I said, 'That is rather a sharp sort of a statement to give me and,' and I said, 'something I would not want to go by unless I actually knew it to be the fact by a physician who had actually physically examined her,' and I told him to give me the name of some specialist, and he gave me the name of two specialists, a Dr. Miller of New York and a Dr. Fishberg of New York. When I came back from that visit, I got hold of her brother and I says, 'Marcus, I have been down to see Dr. Fuerstman, he tells me that from what I told him of Reggy's illness, that she must have t.b., and he seems to feel that even without examining her he would come to that conclusion.' I said, 'I want to find out for myself; I am going to call a specialist to examine her,' and he says, 'Who do you want to get?' I said, 'I am not going to tell you who I am going to get. I am going to bring a specialist up to the house to examine her. He ridiculed the idea. 'Why,' he says, 'That—he is crazy.' He says, 'That man doesn't know what he is talking about.' That was the pith and substance of that conversation.

Q Yes. This took place when? A I would say some time during the latter part of December, or thereabouts.

Q Well, is that the thing that made you suspicious that your wife had tuberculosis?

A That was the first thing that gave me cause to suspect.

Q And did anything else occur from that time until the time you went to Dr. Ornstein's office—(interrupted). A Pardon me.

And also in talking to Dr. Fuerstman, he told me, 'Gus, if you will bring me a sample of her sputum, I can examine it and I will be able to tell you with some reasonable degree of accuracy, whether or not she has tuberculosis.' I came home and I told her brother I wanted him to get a sample of her sputum. I did not want him to tell Reggy about my visit to Dr. Fuerstman, because I didn't want to scare her because perhaps she did not have tuberculosis, perhaps he was wrong in his surmise. He refused to give me a sample of her sputum. does that answer that question, Mr. Lane?"

This was the first intimation or suspicion which the petitioner claims he ever had that his wife was suffering from tuberculosis, or had, at any time, suffered from that disease.

The petitioner then testified as follows (Case, p. 31):

"A I spoke to my wife about this time. I told her I was going to have another doctor examine her and I would absolutely insist upon it whether she liked it or not, I was going to get another doctor and she wanted to know who I was going to get, and I told her I would not tell her who I intended to get, that I simply would bring a doctor to the house.

Q Did you have any reason for refusing to tell her what doctor you were going to get? A I felt that her brother and Dr. Ornstein were concealing the nature or the extent of her illness and I told her that and I told her that I wanted to get another doctor because I wanted to have a doctor that would tell me what her trouble was.

Q Now, did you tell her at that time what Doctor Fuerstman had reported to you? A I did not tell her what Dr. Fuerstman had reported to me, because I did not want to cause her any unnecessary alarm.

Q All right, now proceed. A I became very persistent in these demands, this is already towards the latter part of December or early part of January, and about this time, or say, about the middle of January, it may have been about that time, my wife told me she was going to Dr. Ornstein to be examined again. She wanted me to go along with her. I told her I did not care to go to Dr. Ornstein, that I had no confidence in the man, I had no confidence in what her brother said. Finally she prevailed upon me to go with her. Her brother and she and I went to Dr. Ornstein's office.

Q When was this? A I would say that was the latter part of January.

Q In 1929? A 1929. We all went to Dr. Ornstein's office. He gave her a physical examination, in my presence, and then took us all inside into the dark room. She was disrobed and stood before a fluoroscope and Dr. Ornstein attempted to explain to me what the fluoroscope showed. He said, "You see the trachea and the lungs are pushed together." I told him, "Doctor, I don't know anything about these things. I don't know anything about anatomy." I said, "Frankly speaking, I don't even know what a trachea is." I says, after we got out of the dark room, I said, "I want to know what the trouble is. How do you designate her ailment? What is she suffering from?" And he says, "She has got a very bad cold and bronchitis." And I said, "Well, doctor, I want to ask you a question. Has my wife got tuberculosis?" He says, "Absolutely not. Don't be foolish." I said, "Doctor, do you think my wife ought to go away for a little while?" I asked him that question because I wanted to see the response it would draw. "Well," he said, "It wouldn't do her any harm for her to go away for a little while." I said, "Do you think a trip up to Saranac Lake might do her any good?" "Well," he says, "it may do her some good."

Q Prior to that time did anybody suggest to you that Saranac Lake was a good place for her? A No, sir.

Q Why did you suggest Saranac Lake? A I suggested Saranac Lake because I already suspected from things I had heard and seen that she was not suffering from bronchitis and I wanted to see what response my suggestion would draw. He said to me, "It wont do her any harm to go up there. Suppose she does go up there for about a month or so." And after that we made arrangements for her to go to Saranac Lake.

Q Did you take her there? A I took her up.

Q When was that? A I took her up at night; we left New York City, I think, on February 5, and arrived there on the following day, the sixth.

The petitioner stayed with the defendant at Saranac Lake during the week-end of February 5th and on February 20, 1929, he, together with Dr. Greifinger, left New York City for Saranac Lake, arriving there on February 21, 1929, where they remained until February 24th inclusive, leaving there on that day and arriving at New York City on February 25th. The petitioner testified that on February 21st, the day they arrived in Saranac Lake, they went to Dr. Leetch who was then attending the defendant. The testimony regarding this is as follows (Case p. 34):

"Q Well, did you take her—go with her to any physician at that time? A I didn't take her to any physician, but I arranged to have a Dr. Leetch at Saranac Lake examine her.

Q Did you go to that doctor with her? A I went with her brother to that doctor and made arrangements for Dr. Leetch to come to the place where she was then staying—she had been removed to a new sanatorium known as Lynch's Cottage—and

made arrangements for an examination to be made of her that afternoon.

Q And were you present at the time when the examination was made? A I was in the room.

Q And who was it that examined her? A Dr. Leetch made the examination.

Q And when he made the examination did he make any statement to her? A Why, he told me she ought to be well, there was nothing to fear, did not seem to be quite as serious as she might think it to be, because she was in very depressed spirits at the time. He told me in her presence that she had a very bad attack of bronchitis and she had a very bad bronchial condition.

Q Yes? A After he got through with his examination, my wife asked me whether there were any other questions that I wanted to ask him and I told him "No," I didn't want to ask him any other questions. "Well" she says, "if you want to ask him any questions, you better ask him now." I said "No, I don't care to ask him any questions now."

Q Why didn't you care to ask him any question? A Why, I was very peeved and angry. In fact, I think I showed my anger at the time, because I had told her brother that whatever conference or consultation took place between him and Dr. Leetch I wanted to be present, I wanted to hear everything from beginning to end. I figured that Dr. Leetch was not familiar with the history of the case, that before he could make a proper examination of her, he would require a history of the case, and I wanted to hear the history of the case. Just before Dr. Leetch came into the room—just before Dr. Leetch came into the room to make the examination—in fact, I didn't know Dr. Leetch was there—her brother excused himself from the room and was gone about a half hour, when he reappeared with Dr. Leetch, and I felt he had already given the history to Dr.

Leetch, notwithstanding my request and expressed desire to be present at every conference that took place between Dr. Leetch and her brother. After Dr. Leetch left, my wife said, "Why didn't you ask him the questions you said you were going to ask?" I said, "It wouldn't do any good. I don't intend to ask him any questions." And I bawled out her brother in her presence.

Q What did you say to him? A I said, "I told you I wanted to be present at that conference." He said, "Well, the ethics of our profession are such that it is not proper or ethical for the patient or the kin of the patient to be present at the consultations between professional associates. I told him, "Well, I don't know much about medical ethics, but it struck me rather odd that one who is as close as I am to my wife should not be permitted to be present at a consultation between doctors," and I told them at that time, and I told her that I was going to get another doctor to examine her before I felt Saranac Lake. They wanted to know who I intended to get. I told them I will make my own selection and bring them to the sanatorium and make my examination and I told them they wouldn't know who I am bringing up until I bring them up.

Q When Dr. Leetch examined your wife, did he say anything to her about her lungs, in your presence? A No, sir.

Q Did he make any comment as to what had been done to her before that time? A Earlier in the day when he—I had arranged for the examination that was held that afternoon, her brother and I were in his office and he asked her brother to state the history of the case, and Dr. Leetch said, "Who let her lung out before?" He no sooner had said that, before he even had a chance to finish that sentence, than her brother interrupted him and said, "Why go into the history of the case now? Let us wait until you go up and make your examination."

Referring to the examination that was held later in the day and which I have already testified about.

Q Then you say you decided to have an independent examination made? A Yes, sir.

Q And did that examination take place? A No, sir. I was so confused, I was so shocked, I was so much at sea by things that were happening up there that I was really at a loss for anything to do, and for the next two or three days I was up there I just couldn't get my bearings. I think the Sunday following Washington's Birthday, Dr. Leetch—that is, her brother and I were stopping at the Saranac Lake Hotel and Dr. Leetch was visiting some friend there and he had just passed through the lobby and I met her brother there and I said, "I wish you would arrange for a conference with Dr. Leetch, I would like to talk to him." I had made up my mind I wanted to have a conference with Dr. Leetch and find out just what he had to say about her illness. He did approach Dr. Leetch and an appointment was made for that afternoon at three o'clock at the office of Dr. Leetch. At the appointed time I and her brother came to Dr. Leetch's office. We found present at that time a Mr. Plank or Plant, who was the X-ray man for Dr. Leetch, and Dr. Mayer and several other doctors who had their offices in the same building. We all went into the dark room, of the X-ray room. We were in the dark room and Dr. Plant, that is Mr. Plant, took out a number of X-ray plates, exposed them before a certain light that they have for reading X-rays and he began to point out to Dr. Greifinger and Dr. Leetch in my presence, what these X-rays showed, but as the X-rays were held up before the light I noticed the name of my wife, the maiden name of my wife on one of these plates. They all bore the marking "Regina Greifinger" and they had the dates on them. I noted the dates and was surprised to learn

that these plates—there were about eight or ten or perhaps more—extended over a period of time of about two or three years; that they had been made at intervals of about two or three months apart. I was so amazed by seeing the dates, some of them running into 1927, some during the time I was courting her, all showing that she had been examined periodically for two or three years prior to the time that I married her. I made no comment in the X-ray room, I simply listened because I felt there was no comment for me to make, as long as the X-ray man was talking at the time; and the X-ray man pointed out to Dr. Leetch that she had a very large cavity; he pointed to a certain area on the plate that indicated a large cavity in her left lung. After we were through in the X-ray room, we entered Dr. Leetch's office. He was using Dr. Mayer's room at that time. Mr. Plant left the conference and Dr. Greifinger, Dr. Leetch and I were the only ones present at this conference. We seated ourselves and I told Dr. Leetch that I wanted to ask him some questions. I says, "Doctor, has my wife tuberculosis?" He says, "Yes." I says, "Are you sure about it? Is there any question about it?" "No question at all about it." I says, "Doctor, can you give me an idea how long my wife has suffered from this condition?" He says, "Well," he says, "From the X-ray plates that I have just seen I would say that she has been suffering from tuberculosis at least for the last two or three years." I says, "Has she got a very serious condition?" He says, "She has a very bad condition in the left lung." I told him that I heard Mr. Plant make some remark about a cavity in the left lung and I asked him what that cavity condition was. He told me she had a very large cavity, indicating by his fingers that her cavity was at least an inch square in dimensions. I asked him how long, in his opinion, a cavity of that size would take to heal and he told me a

very long time. In fact, he told me it might become necessary to perform some surgical operation. I told him that I had never known the treatment of tuberculosis at any time called for surgical operations and he told me, "Yes," he says, "it may be necessary to perform an operation to relieve the pressure on the lung." I asked him whether he was sure that such an operation might become necessary and he told me it was hard to say, he would wait about two or three months to see how she progressed.

I asked him how long he thought she would be up there. He said, "The way I figure" he says, "she would be up here about a year, unless she makes unusual progress." I then asked him whether, in his opinion, it was a wise thing for Reggy to have married me. He said "Well, it is hard to say, but" he says, "I guess it might have been better for her not to have married you." I asked him other questions of a similar nature and after I had gotten through—and, frankly speaking, I really conducted a very rigorous examination of him for a period of about a half hour or so—after I got through, her brother in an attempt to relieve the tension of the situation said, "Well, doctor—" (interrupted).

At this point, objection was made to certain testimony but the petitioner proceeds as follows (Case, bot. p. 40):

"Q Proceed. A After Dr. Greifinger had made a remark that I subjected Dr. Leetch to a very vigorous cross examination, I said to Dr. Leetch in a very—I seemed to be very angry—I was very angry at the time, I said, "Doctor, this is the first time I have been able to get any information as to the nature of my wife's illness; this is the first time I have learned that my wife has tuberculosis." I said, "This fellow sitting here—" pointing to her brother, Dr. Greifinger, "—and Dr. Ornstein have both been telling me all along that my wife only has bronchitis

or a very severe condition of bronchitis." I said, "I think it is a shame that doctors will conceal a condition of that kind." I said, "By doing that they have deprived me of my independent judgment as to what course of action to pursue in the treatment of my wife." I said, "I think they are both a disgrace to their profession." Dr. Greifinger sat by and he didn't say a word. In fact, during the entire conference with the exception of the remark he made that I had subjected Dr. Leetch to a vigorous cross examination, he didn't say a single word, he simply sat there ashen white and made no comment at all. Well, when we got out of the conference room it was then already about five o'clock or so that afternoon. We both wanted to go up and see my wife; we were walking up to the Saranac, and I refused to walk with him. I told him I didn't want to have anything to do with him. We went up to see my wife and she asked me what Dr. Leetch had said. I told her that Dr. Leetch had said that she would be well in a very short time—I didn't want to cause her any alarm—that she had nothing to worry about, a little patience and courage and she was to be well shortly. That night we left for Newark and I returned to my office the following morning.

Q After that you brought this suit? A That same day that I returned from Saranac Lake I saw you, Mr. Unger, and I retained you for the purpose of bringing this annulment action.

Q Prior to the time that you were informed by Dr. Leetch, on February 24, 1929, that your wife undoubtedly had tuberculosis, had anyone given you that information? A In all the time that I saw her—(interrupted)

The Court: Just say yes or no. A No, sir.

It was therefore on this occasion, February 24, 1929, eight months after his marriage to the defendant that the petitioner learned for the

first time from any physician who had ever examined her, that the defendant suffered or had suffered from tuberculosis at any time, either before or after marriage.

The Question in Issue.

It having been established not only by the admissions contained in the answer, but by overwhelming evidence, that the defendant was to her own knowledge, afflicted with tuberculosis for some years prior to the time of her marriage the whole case then resolved itself into this question:

Did the petitioner have knowledge at any time prior to his marriage to the defendant, that the defendant had suffered or did suffer from tuberculosis prior to that marriage?

If petitioner's statement and his testimony are to be believed, then the petitioner is entitled to a decree annulling the marriage.

The petitioner had no knowledge at any time prior to his marriage to the defendant that she had at any time prior to their marriage suffered from or did suffer from tuberculosis, and the Court erred in finding that he did have such knowledge.

It is almost elementary that an appellate court seldom disturbs the findings of the Court below on disputed questions of fact, but the petitioner submits that the cases are numerous where the appellate courts have done so, particularly when the findings of the Court below are clearly contrary to the weight of evidence or the findings and conclusions of the Court below are based upon facts which it took into consideration, if

these findings as based upon clear improbabilities. Nearly all cases of fraud have the issues drawn on definite affirmations and denials and naturally so. The person charged with fraud denies it. When frauds are planned, they take so many forms or guises, almost as many as there are human minds. To detect fraud means that one must not go by the denial of it, but very often the fraud is detected by small details which the schemers have overlooked. The most skillfully perpetrated fraud of times is betrayed by the smallest earmarks of the same. A perfect fraud that escapes detection is almost as rare as a perfect crime which escapes detection. In the case at bar, the appellant contends that the Court below ignored human factors, human probabilities and human conduct in arriving at its conclusions. On appeals from questions of fact, the difficulty that confronts the appellate court is that it is not afforded the opportunity of observing the demeanor and conduct of the witnesses as they testified, the expression of their faces, the precision or faltering way in which they give their testimony, the shifting of the body, the motions of the hand and numerous other human motions and actions that betray the liar and indicate false testimony. Perhaps, time will evolve trial procedure where the Appellate Courts will some day have the benefit of talking pictures of a trial but now, the only thing that the appellate court has before it is the written word. An examination of the testimony of the petitioner shows a precision and accuracy, as well as a plausibility and logical course of human conduct that unquestionably stamps his testimony as truthful. The learned Vice Chancellor paid little attention to the force and effect of the petitioner's testimony. In that class of cases in which an attempt is made to prove a

carefully devised fraud and particularly those which involve a suppression of fraud, the person seeking to prove the fraud must rely almost entirely or wholly upon circumstantial evidence. In this case there was a failure on the part of the Vice-Chancellor to make these human observations; his willingness to be guided only by the spoken word; his unwillingness or failure to guide himself by what any ordinary human being would have done under the circumstances as the petitioner did, as his testimony shows; his willingness to believe such an illogical and improbable state of facts as were shown by the testimony of the defendant and her witnesses, is of such a nature as to show clearly that the Vice-Chancellor erred in his conclusions. Let us now proceed to examine the testimony of the defendant and her witnesses, and prove thereby that this is so.

The defendant contends that the petitioner had knowledge that she had suffered from tuberculosis prior to their marriage, from three sources: (a) from the defendant (b) from her brother, Dr. Greifinger, and (c) from Dr. Ornstein. Her testimony on this point is this (Case, p. 185):

“A Mr. Goldstein proposed to me Christmas. We were not officially engaged until February 4th. I got into bed the end of January, 1928. He had already chosen the stone that he was going to give me for my betrothal ring. At the end of January, when he came to the house he said, ‘Well, we are all ready to have the stone set,’ and I told him, ‘Well,’ I said, ‘I have got a cold now; I wish you would wait.’ I said I had had a tubercular breakdown five years ago and I always feared a relapse and I didn’t want to make any official announcement until I was sure that this was just a cold and I was going to recover. I told him—then I told him about how I had contracted tuber-

culosis; I had been away at Brown University—

The Court: Well, now, don't go into that.

Q Tell us what you told him, that is all.

A I told him that.

Q Did you tell him about Brown University? A I did.

Q Now, due to those statements that you made, what was his reply? A Well, he replied that he loved me and he would marry me if I had a wooden leg."

But on cross examination, she testified as follows (Case, p. 196):

Q Yes. And prior to the time that he was engaged to you—became engaged to you, not publicly but privately, in December, 1927, you had not mentioned anything to him about your having gone to Saranac Lake? A No, I did not.

Q Not even when he proposed to you at that time? A No, I don't think I told him.

Q No. Did it occur to you that he might want to know that at that time? A Did it occur to me that he might want to know?

Q Yes. A Well, I knew I was going to tell him before I married him. I had all—(interrupted).

Q Well, why were you going to tell him before you married him? A Because I thought it was a husband's place to know; I did not wish to misrepresent myself.

Q Yes. But were you going to let him announce his engagement first? A No, sir.

Q When did you expect to tell him? A Before we announced our engagement.

Q Before you announced it? A Yes, sir.

Q When did you announce it? A February 4, 1928.

Q Yes, and when did you tell him? A On or about February 1st.

Q 1928? A 1928.

Q Before you were engaged to him formally? A Yes, sir.

Q And what was the occasion when you told him? A The occasion was when he brought me the stone, when he had chosen the stone and was about to have it set.

Q And when was that? A When was that?

Q Yes. A That was when I was sick in bed.

Q Yes, but— A On or about February 1st.

Q February 1st? A Yes, sir.

Q So that it was not in January, it was February 1st. A I believe it was February 1st; it might have been January 31st.

Q *And the engagement cards had already been printed, had they not?* A *I believe they had.*

Q You had not told him prior to the printing of the engagement cards that you had been afflicted with tuberculosis, had you? A No, sir.

Q So that some time between the printing of the engagement cards and the formal announcement of the engagement you let him know? A I did.

Q Do you recall the date on which you got the engagement ring? A February 4th.

Q February 4th. And was it on that day that you told him of it? A February 4th? No.

Q When was it? A I told him February 1st.

Q Told him three days before? A Yes, sir.

Q And why did you wait until three days before you got the ring to tell him? A Well, because there was a lapse of five and a half years and I had almost forgotten that I had tuberculosis, I had been so well from the time of my cure till that day that it was past history to me.

Q You felt there could be no possible recurrence of it? A Well, whenever I got

a cold—when I got that cold the fear entered my heart and I felt there might be a possibility, but when I was well I never thought of it.

Q You had felt so well that you had not seen fit to disclose this to him from the time when you met him and were afterwards engaged to him, down to the—down to three days before the time when he presented you with an engagement ring; is that right? A Well, I knew I was going to tell him that I had tuberculosis.

Q Well, why did you postpone it until the evening of the engagement; why did you wait until three days before the ring was on your hand? A Well, I didn't think—we were getting married then and if I told him and he—

Q What is that? A We were not actually being married, I felt if I told him—(interrupted).

Q Any time before you were married? A Yes. He could still change his mind.

Q Yes. So that it made no difference to you whether you were engaged so long as you told him that some time before you were married? A Yes.

Q Didn't it occur to you that it would save a lot of trouble and heartaches for all of you if you told him that before you were engaged? A Well, I guess I didn't think about it.

Q Didn't think about it. It was one of those things that you didn't want to think about wasn't it?

The Court: Well, really, Mr. Unger, I can't see what this has to do with it?

Mr. Unger: Well, your Honor please, I want to respectfully differ with you.

The Court: All right. Go ahead and put it on the record, if you want to.

Mr. Unger: I never waste the Court's time, but this is a very important case for both of these people.

The Court: It seems to me you are wasting it now.

Mr. Unger: If I am wasting time I beg the Court's pardon, but I did not interrupt the very lengthy cross examination of my own client; it took one hour and a half.

The Court: All right. I want you to have all the—

Mr. Unger: Will you read the last question of Mrs. Goldstein?

(Question read as follows: "Didn't think about it. It was one of those things that you didn't want to think about, wasn't it?")

The Court: What is your answer to that, Mrs. Goldstein?

The Witness: Why, I certainly—if I felt that I was going to go through all this—I never dreamed of anything like this.

Before discussing the above extract from the testimony, the attention of the Court is called to the interruption by the Court below at what was probably the most crucial moment of the trial. The cross examination was developing a situation that clearly showed *bad faith* and *lack of integrity* on the part of the defendant. Such bad faith would seriously affect the credibility of the testimony of the defendant. It is, of course, a familiar principal, that the presiding Judge has a right to limit the testimony given at a trial, within reasonable bounds, but it is respectfully submitted that in a case involving fraud, wider latitude in the examination of a witness is essential, and permissible, particularly so, is this true when the examiner has the witness in a position where the witness cannot extricate himself or the witness, realizing, as in this case, that her good faith was being assailed, must extricate herself from that position. The

appellant contends that this conduct of the Court below was an unwarranted abuse of judicial discretion and was an interference with the orderly proceedings of the trial of a cause. The learned Vice-Chancellor took the case at its most critical point, when the witness was being examined about the *main point of the case* and the deciding factor of the case, and as we contend without any right, *broke up* the examination of the witness by an argument that ensued; and in the interim the defendant was able to collect herself and organize her thoughts. It is hard by the written word, as it comes from the pen, to picture or describe the scene. It is hard, by the written word, to show the facial expressions of the defendant, her actions, her demeanor during this examination up until this point. It is also difficult to show how the action of the Vice-Chancellor interrupted the examination at this point. These remarks are interjected at this point so that this court may later read this incident in connection with other incidents which happened at the trial and are hereinafter set forth.

Now, then, the defendant's testimony shows that this alleged conversation which she claims took place on *February 1st* is the *only time* at which she told the petitioner that she had ever been afflicted with tuberculosis. Would not the natural course of events have been to mention it to him in such a way on other occasions that it would stand out in her memory equally as strong as on this particular occasion? Nowhere in her testimony does she mention what the reaction of the petitioner to this important revelation was. Would it not have been the most natural thing for the petitioner to ask her from time to time different questions that might arise

in his mind, different doubts that should be overcome by her and her physicians? Is there any testimony at all about his reaction? No—because *HE NEVER WAS TOLD BY HER!*

Good faith on the part of the defendant would have been this: As soon as she perceived that the petitioner was calling upon her as often as has been testified to and as soon as she saw that his intentions were growing serious and a proposal of marriage was in the offing, and before the affair progressed any further, she should have told the petitioner the whole history of her tubercular condition; and she should have told him everything that she testified to at the trial, leastwise, at the time he proposed marriage to her, at which time the petitioner could then have decided for himself whether or not he desired to marry the defendant under these circumstances. This would have been the honest thing for her to do—the honest thing that any person with honest intentions would have done at that time. Instead, what did she do? She permitted the petitioner to become engaged to her, to purchase a valuable diamond ring which cost him in excess of \$1,500; she permitted the formal announcements of the engagement to be printed, although they were not sent out until February 4th. Meantime, as is usually the case, before a formal announcement of the engagement, their friends became acquainted with the fact. Her conduct shows every dishonest intention, so much so, that this in itself is sufficient to stamp her testimony as unworthy of belief. Note the portion of her testimony which reads as follows (Case, p. 198):

Q And why did you wait until three days before you got the ring to tell him? A Well, because there was a lapse of five and a half years and I had *almost forgotten* that I had tuberculosis, I had been so well

from the time of my cure till that day that it was past history to me.

Isn't it reasonable to assume that if she had *not* been ill in February, 1928, that she might have *chosen to forget*, according to her own testimony, that she had had tuberculosis at any time prior to marriage? At this point it is well to note the following language from the conclusion of Vice-Chancellor Church (Case, p. 235):

“A great point has been made of the fact that she did not tell him about this trouble before their engagement. I do not see any reason why she should have told him at that time. *He was a mere stranger. She did not know whether he was going to propose or not*, and I see no reason why she should have advertised her illness to somebody that was a mere caller.

To us it is a very peculiar conclusion that a person who is engaged to marry a girl is a “mere stranger.” Furthermore, apparently, the Vice-Chancellor clearly misunderstood the relations which existed between the petitioner and the defendant on the date on which she alleges she told him about her condition when he says “She did not know whether he was going to propose to her or not and I see no reason why she should advertise her illness to somebody that was a mere caller.” The testimony shows that the Vice-Chancellor was clearly wrong in this respect because the petitioner was not “a mere caller” or a “mere suitor.” At least he was a suitor and a lover, more than that, he was *actually engaged* to marry her in December, 1927, and she, according to her own testimony, did not tell him until February 1, 1928—after he had already purchased a diamond engagement ring for her, the engagement announcements had already been printed and ready to be mailed out

and in fact, the engagement was already well known among her friends. Isn't it reasonable to assume that if the Vice-Chancellor *did not err* in this respect that he would likewise conclude, as any reasonable person would, that she acted in bad faith and was not honest in her failure to disclose before December, 1927, when they were engaged, those facts which she alleges she told the petitioner on February 1st, following.

It is essential to carefully note the testimony she gave on her direct examination as to what she told the petitioner, the extract of which appears above, and then note the testimony on cross examination (Case, p. 199) as follows:

Q All right. Now, come down to the first day of February—you say that was the day—and tell us again just what you said to him and how you led up to the conversation.

A He said he was going to have the ring set—he had already chosen the stone—and I said, "Wait before we make any official announcement or before you give me the ring." I said, "I have a cold now. My brothers says it is just a cold, but I had a tubercular breakdown five and a half years ago and it takes—in the first place, it takes me longer to get rid of a cold than it does a normal person; and, in the second place, you never can tell whether a cold will turn out to be a relapse of the tubercular condition. I want to be sure." I asked him to wait.

Q Wait for what? A Before he set the stone and before we sent out the cards of our official engagement.

Q This was on the 4th of February? A Yes, sir.

Mr. Clancy: The first.

The Witness: The first of February.

Q The first of February. Is that all you said to him about your condition on that oc-

casion? A About my—at that time present condition or about my previous condition?

Q No—yes, about your previous condition. A I told him how I had contracted tuberculosis and when it was discovered and how many years had elapsed since my tuberculosis—cure—since I had taken the cure and the present time. I also told him that I had never had a cold from that time until that present time.

Q Did you tell him anything else on that occasion? A Well, I don't recall whether I did. I just fully explained the condition, that is all.

Q You gave him to understand fully, what the matter had been with you? A Yes, that I had had tuberculosis; my brother said that that was just a cold and—

Q You wanted him to know everything that had ailed you? A Well, I wanted him to know my past.

Q Yes. Did you tell him that you had been to Saranac Lake— A Yes. I told him that I had.

Q You did not recall that when your lawyer asked you or when I asked you a moment ago, did you? A When you asked me what?

Q If you told everything. A Well, I told him everything that I thought he should know.

Q Did you tell him you were up at Saranac Lake? A Yes, I told him that I had left my home.

Q Did you tell him where you went? A Yes, to Saranac Lake in the Adirondacks.

Q You recall that now, do you? A Yes, sir.

Q You are sure you told it to him? A I am sure.

Q Did you tell him you were going to Dr. Ornstein on an average of about six months apart? A Yes, I told him that.

Q Now, is there anything else that you told him that I have not reminded you

about? A Well, I don't recall what else I might have said that evening.

Q Did you tell him that you had X-ray plates taken of your chest? A That I had X-rays?

Q Yes. A Why, everybody has X-rays who has chest trouble.

Q Did you tell him that? A *I don't think—I don't recall whether I told him I had X-rays, no.*

Q Did you tell him Dr. Ornstein made X-ray plates of your chest? A *No, I don't think I told him that.*

Q And he said then he did not care what was the matter with you, he would marry you if you had a wooden leg? A Yes.

Q And that was the only occasion prior to your marriage that you told him about your past in so far as your lungs were concerned? A That was the only time when I had a specific discussion of him—of it.

Q You had never mentioned it before that time, of course? A *No, sir.*

Although her direct examination was skillfully directed by her counsel, and although the defendant seemed to be willing to "remember" those things which were essential to her case, she "overlooked" on direct examination, in telling what she testified to in the above extract of the cross examination. Now, is it reasonable to assume that a man, under these circumstances, would marry a girl suffering from such a disease which, to the average layman, is dreadful and one of the worst known human afflictions? Weighing the probabilities and improbabilities, is it reasonable to assume that the average person would enter into matrimony under such conditions?

Under circumstances such as were found to exist in this case, the following extract from the opinion of Justice Blanchard in *Sobel v. Sobel*,

150 N. Y. Sup. (Sup. Ct. N. Y. 1914) is very pertinent:

“* * * it is for the court, in the exercise of sound discretion and with regard to public policy, because of the peculiar nature of the contract, to determine whether or not the misrepresentations of fact and the probable consequences to be expected because of these misrepresentations are of sufficient importance to cause the court to exercise its power to dissolve the contract in the interest of the parties and that of the public at large.”

And to the same effect is the following from the opinion of the Court in *Smith v. Smith*, 184 N. Y. Supp. 134 (Sup. Ct. N. Y. 1930):

“Marriage being a mutual and voluntary compact based on mutual regard and affection to live together as husband and wife as long as both shall live, a confidential relationship exists between those contemplating marriage that demands frankness and truthfulness as to all facts that would affect the decision of either party. Persons who have agreed to marry owe an affirmative duty to inform each other of all facts material to their contemplated marriage, not alone because such facts may affect the decision of the contracting parties, but the State and community has an interest by reason of the property rights involved and the possible issue of the union. And if either party is unfitted by age, physical condition, mental incapacity or legal disability from being joined in lawful wedlock, that party should not remain silent; there is a clear duty to speak, as such facts are of the very essence of the contract of conjugal union. Silence implies marriageability. A confidential relationship exists between persons who contract to marry, and, occupying such positions toward each other, concealment of material facts may be fraud. The suppression of the truth, when there is a duty to speak, is a

fraud. Smith, Frauds #9. There is a legal and moral obligation to communicate or disclose facts material to the contemplated marriage."

The petitioner testified that in July, 1929, he visited the defendant at the sanitarium at Saranac Lake, New York, where she was then stopping. This testimony is repeated below at length (Case, p. 42):

A Around July of this year I went up to Saranac Lake again.

Q And what was your purpose in going up there at that time? A My purpose in going up at that time was to see Dr. Leetch, Mr. Plant and Dr. Brown and arrange for the taking of depositions there.

Q And while you were there did you meet your wife? A On the third day that I was there I met my wife.

Q Did you talk to her? A Yes, sir.

Q About her illness? A Yes, sir.

Q What did you say to her? A I came up to the place where she was staying. As I entered the room—she was fully dressed at the time—she threw her arms around me and began to sob and cry. After she had come to herself I told her to lie down and we began to talk. I told her she seemed to be looking very well, she had taken on a lot of weight and I understood from her physician that she would return to Newark shortly after Labor Day. I told her I was very glad to hear she had made such splendid progress, and then we talked about a number of other matters. She told me that I was a fine fellow for bringing this action, and she upbraided me for it. She told me that I certainly must have loved her a whole lot if I could not overlook this illness of hers, that love called for sacrifices. I told her that under the circumstances of this case it did not call for any sacrifice at all; she had deceived me, she had kept from me a condition, which, had I known, I never would have mar-

ried her; I didn't think it called for that sacrifice. She then asked me, she said, "Well, the thing I really have most against you is that you brought the action when you did. Why couldn't you wait in bringing the action? Couldn't you wait at least until I had gotten better and could withstand the shock of it?" I told her that as a result of conferences with my counsel that we decided that prompt action was the only thing for us to take. We talked about other things. I tried to assure her and console her with whatever ways I could under the circumstances and I told her that I was going back to Newark that night. This was on a Saturday night. She begged me to stay a little while. She said, Why don't you take a vacation for a week or so up here. I said, 'No. I am not in a mood for vacations right now.' She told me that she would appreciate it if I would at least stay the following day, because none of the people in the house knew of this action, and it was very embarrassing to her, that her husband, she being only married a short time, should not come up to see her and had not seen her for so long a time and had come up and stayed only a few hours. She prevailed upon me to stay until the following day. I came up the following morning and we spoke again. She told me that she regretted that she had ever married me and the reason for it was that my code of doing things and my ways of doing things was too perfect, that I could not overlook any shortcomings in any individual. I told her, I says, 'Well,' I says, 'now, I cannot agree with you,' I says, 'You should have told me about this condition. Why didn't you tell me that you had tuberculosis?' 'Well,' she said, 'I did tell you.' I says, 'You did not.' She said, 'Well, didn't I tell you that I had a nervous breakdown?' I said 'What does a breakdown mean to anybody?' I said 'In the first place, you never told me you had a breakdown, and, in the second place, a breakdown doesn't mean tu-

berculosis in my language.' We continued to talk along those lines for a little while, and then she told me, she says, 'You know,' she says, 'You know, you would have married me if I had told you about this,' I says, 'I would not; I never would have married you if I knew about this.' I said, 'Why didn't you tell me?' I said, 'If you would have told me, at least you would have given me an opportunity to decide for myself. You never even presented the opportunity for me to decide.' She said, 'Well, I wanted to tell you,' she said, 'from the time I met you, I loved you and I loved you very dearly and I wanted to marry you and at the same time I wanted to tell you about my illness and the fact that I had had tuberculosis, but,' she says, 'you know how our Jewish folks are, a girl wants their home, they want to marry. My folks told me that I should not tell you, they all urged me not to tell you. They were afraid if I told you you would not marry me.' She says, 'We had more fights home, we discussed the matter so often, and the conclusion was that I was not to tell you and I did not tell you.

Q Did that end the—(interrupted) A That ends—that was really the pith and substance of it. The conversation may have been longer in detail.

Q And you left? A No. I sat around after that. We talked. She came over to me occasionally and caressed me and put her arms around me, told me that she still loved me and so forth.

Q Have you lived with her as man and wife since December, 1928? A Well, I lived with her up until the time she went up to Saranac Lake. She went to Saranac Lake—

Q In December? A No; she went to Saranac Lake in February.

Q In February. Since that time you have never lived with her? A No, sir.

Isn't everything in this testimony plausible? Isn't it reasonable to suppose that every circumstance set forth therein is the truth? Does this testimony show any absurdity? And now, note, (from the defendant's testimony) on page 213, the following:

The Court: Did he ask you to make any defense to the case?

The Witness: Did he ask me to make any defense? He knew I was making a defense.

The Court: Well, did he ask you to withdraw the defense?

The Witness: No, he didn't ask me to withdraw. He—(interrupted)

Yet she testifies (Case, p. 211) that on the occasion of this visit, the petitioner made love to her and advances to her, "that he kissed her feet"; that he wanted his freedom and then came this pertinent question on page 211.

Q In the same conversation, on the same day, he not alone told you that he loved you and wanted to withdraw his case, but that he wanted his freedom from you, is that right? A On the same day he told me that.

Would it not have been the most natural thing for the petitioner, if he wanted his freedom, to ask the defendant to withdraw her defense? As has been repeated several times in this brief dealing with the law of probabilities, would not that have been the more probable thing and the more logical thing for him to do? Clearly, the petitioner's version of what transpired on the occasion of this visit is entitled to belief, and the defendant's version is entitled to no belief whatever. Furthermore, she testifies as follows (Case p. 191):

"Do you know that this is constructive desertion? You are telling me to leave your

bedroom?" I said, "I don't care. I am tired."

Isn't it ridiculous to assume that the petitioner, while still maintaining an action for annulment, should even mention such a thing as constructive desertion? Counsel for the defendant made much of the fact that the petitioner, although a lawyer, saw fit to visit the defendant on this occasion. The petitioner testified that on the occasion of this trip he was there altogether about four days. It was not until the third day that he decided that he wanted to see the defendant. Very naturally, the petitioner was still interested in knowing of the defendant's condition. After all, she had been his sweetheart, his wife, and now she was a sickly woman. Was it not a natural impulse that impelled the petitioner's desire to see her on that occasion? Isn't this impulse a human impulse, explained by the following question and answer (Case pp. 55-56):

A It was just an impulse perhaps from my long relationship with her. I don't know how I can explain it, except the idea entered my mind and I thought I would go at that time and see her for a few minutes and I did see her for a few minutes.

Would not any honorable human being have done the same thing that the petitioner did under these circumstances? And yet, the Vice Chancellor characterized the act as "indecent." What human decency is there if there is no heart and soul to it?

If the petitioner had any sinister motive in his visit to the defendant, or if he was intent upon gathering testimony to present at the trial of this cause, would he have consulted Dr. Mayer before he visited her and requested him to be present? Would he not have brought along

some other person or persons to listen to the conversation and to obtain such facts as the defendant might unwittingly disclose in this visit. Furthermore, the defendant herself testified as follows (Case p. 210):

Q And he had been there three days had he not, before he came to see you? A I believe he had, yes.

Q And your doctor was Dr. Leetch at that time? A Mayer.

Q Mayer. And do you know that he arranged with Dr. Mayer to see you? A Yes, I believe he did tell Dr. Mayer he was coming over to see me.

Q So that you knew before he came that he was expected. A I knew before he came he was coming, yes.

Q Yes. And of course, at this time the papers in this case had already been served upon you. A Yes, sir.

Q You greeted him, as I understand it, affectionately? A I was very glad to see him.

Q And you told him that you never would have forgiven him if he had not come to see you while he was in Saranac Lake? A I said, yes, I would have been greatly surprised if he had not come to see me.

Q Yes. So it was entirely to your liking that he did come to see you? A Yes, sir.

Certainly, if the defendant did not wish the petitioner to be present, she could very easily have phoned to her attorneys in Newark and obtained their advice as to whether or not she should permit the petitioner to see her. While this whole reference to this visit as made in the cross examination by the defendant is immaterial, mention has been made of it in detail so that the matter may not confound the issue.

Before passing from the details of this visit, it must be noted that the petitioner alleges the defendant told him about a "breakdown" in his

last visit to Saranac Lake, as appears in the extract quoted from page 44, and now note here the testimony (Case p. 213) of the cross examination here, which reads as follows:

Q He admitted that you told him you had had a breakdown—did he not? A Tuberculosis, a tubercular breakdown.

Q You were insisting that you had told him that? A Yes, sir. They are equivalent in my estimation.

Q You mean tuberculosis breakdown and breakdown are equivalent? A No, a tubercular breakdown and tuberculosis.

Q And you were insisting that you had used that expression to him? A Yes, sir."

Reading this testimony together, does it not disclose a strong corroborating fact that she did use or may have used only the word "breakdown" at any time that she alleges she may have told the petitioner about her illness, although the petitioner denies that she ever mentioned the matter of a "breakdown" or any kind of a "breakdown" prior to marriage, and that he had not, at any time prior to February 24, 1928, ever learned that she had suffered from tuberculosis or from a tubercular "breakdown" or any kind of a "breakdown."

We now come to the testimony of Dr. Ornstein. Briefly, without characterizing his testimony or its construction, he testified to the effect that on February 7, 1929, three days after the date of the formal announcement of the engagement, he spoke to the petitioner and informed him that the defendant had at one time been afflicted with tuberculosis or a tubercular condition, the exact language being discussed later. This visit was during the time of the illness in January to February, 1928, several months prior to the marriage. With reference to this visit, the pe-

titioner on direct examination testified as follows (Case pp. 15-16):

“Q Now, during the time that she was in bed, February, 1928, was there any other physician in attendance besides Dr. Greifinger? A Dr. Ornstein, of New York City, visited her on one occasion.

Q Were you there? A I was there for a few minutes.

Q What time did you come? A I arrived at the house at about ten-thirty P. M. I had just returned from a meeting held in New York City. While attending that meeting I called up the home to find out how Regina was feeling. Her father told me she was in very bad shape. I called up several times and they told me there was another doctor in consultation with them. I got back to Newark a little after ten, hopped in a cab and came up to the house. When I came up to the house I was there only a few minutes when Dr. Ornstein came into the living room, as he descended the stairs from upstairs, and came into the living room, and I met him there for a few minutes.

Q What did he say to you? A Her father introduced me to him. I asked him how Reggy was feeling. He told me she had a cold, she would be all over it, it might be perhaps an attack of pneumonia, but there was a very bad cold in any circumstance, and she would be well in a very short time, perhaps a week or so. He seemed to be in a very great hurry to get back. In fact, he stated at the time, he said, “I am in such a hurry to get back; it looks as though I won’t be back before midnight now.”

Q And was that the extent of the conversation between you and Dr. Ornstein that night? A That and—except the comment he made that I had a very nice girl.

Q Was Dr. Greifinger there on that occasion? A I don’t recollect whether he was in the room at that time.

Q Who else was there outside of the doctor and yourself? A I know that her father was in the room.

Q Did her father, or any member of the family, volunteer any other information—

A No, sir.

Because further reference will be later made to this testimony, it will be observed that although Dr. Greifinger was present (he testifying at the trial) and although defendant's father was present, neither one of them at that time mentioned anything to petitioner regarding her tubercular condition, nor did either one of them, nor any other member of the defendant's family in any way, at any time prior to marriage, ever mention the same to the petitioner. *Nor did the father testify at the trial.*

And this is what Dr. Ornstein testified to on behalf of the defendant. He was relating what happened on his visit to the defendant prior to the marriage.

Direct examination (Case p. 100).

(Italics and words in parentheses ours.)

Q Just get down to the conversation you had with Goldstein. A Oh, well, I went down to see, when I came down, I told Mr. Goldstein that there was *nothing to worry about her pulmonary condition*; in fact I tried to explain to him by making a drawing of what had previously happened. I took out one of my prescription pads and sketched what had taken place. I explained—of course, the details of which *I just can't remember exactly*, or the exact words that I used, but I made very plainly a diagram showing the chronic form of tuberculosis, the collapse of the lung, the fluid, how the lung was pulled over and how it distorted the trachea and the bronchia into the left thorax.

(How ridiculous to suppose a layman could understand a pencil sketch of this kind. How ridiculous to make one if there was "nothing to worry about.")

(Case p. 101.)

"I first congratulated him and told him he was to marry a sweet lovely girl and that I had known her for a long time as a patient, that I—of course, my explanation was to him that he knew what was happening; that I wanted to assure him, being a fiance, that *there was no worry* about a tuberculous condition; that this was a cold and would blow over and she would get well.

The Court: You informed him in the course of this conversation that the lady *had a tubercular condition?*

(As a matter of fact the witness had said nothing at all about any such conversation, and this was a very leading question for the Court to ask—but note the answer of the witness.)

The Witness: Yes, I made a *diagram* of the whole thing, sir.

The Court: Oh, well. (The print does not register, but the Court was skeptical about the force of the answer in making this observation.)

But to continue (Case p. 101):

* * * But that particular time I especially felt he should know, I mean, because I thought *he* was terribly alarmed about her condition (there was no testimony showing any such alarm), *not knowing she had the tuberculosis* (here unconsciously the doctor stumbled on the evident truth, and tried to correct it by saying): *Knowing* she had a tuberculous condition, I was sort of sympathetic so he wouldn't feel bad about the thing.

Now contrast the evidence of the Doctor on Cross examination (Case p. 116).

(Italics and parentheses ours.)

Q And then do I understand that unsolicited, you proceeded to inform him of the condition of this girl? A Yes, I did, because I thought he was—he might have been alarmed that it was a tuberculous process that cropped up.

(Imagine the absurdity of this statement in view of the fact that this same Doctor had treated the defendant for tuberculosis since 1923, five years before, and in 1925 and at various periods until February, 1928 (Case pp. 97-98).

Case p. 118:

* * * Q Well, why, if you know, did you think it was necessary to tell him if she told you she had already informed him (of her condition)? A Because I felt that he might be *worried that she had tuberculosis*, and *I wanted to assure him it was just a cold*.

(Query: If it was only a cold why did the Doctor have to resort to a diagram to convey to her fiance that simple information? No doctor would do such a thing.)

Q You wanted to tell him in such a way that he would not be unduly alarmed about it. A Exactly.

* * * Case p. 119:

Q You wanted to lessen his fears on that score? A Well, I didn't think that he was going to annul the marriage at that time, I assure you, I mean, a man naturally—I mean, I just don't understand your question. I thought the man might be alarmed as a man in love would, if someone dear to him was ill, and I wanted to tell him that it *was not a tuberculous process when it was just an acute cold* that was bothering her at that particular time.

(What a rambling answer for an intelligent physician—yet he admits he wanted to tell the petitioner it was “not” a tuberculous process, when it was just an acute cold that was bothering her at that time.)

But to continue (Case p. 119):

Q *Is that what you wanted to tell him?*

A *Yes, sir.*

Q *That it was not a tuberculous process?*

A *Exactly.*

Q *But only an acute cold that was bothering her at that time?* A *Yes, sir.*

Q *And is that what you told him?* A *Yes.*

Q *That it was an acute cold?* A *An acute tracheal bronchitis.*

Q *And not a tuberculous condition?* A *Yes.*

Q *And that she would be all right soon?* A *Yes, sir.*

Can there be any doubt after reading the foregoing testimony of Doctor Ornstein that the petitioner told the truth when he said (Case p. 66):

“A Well, he (Dr. Ornstein) told me she had a very bad cold; she would be well in about a week or so; told me I had a very nice girl, a very lovely girl.”

(But upon the assumption that the diagram which the Doctor says he drew and submitted to the petitioner was intended to or did apprise the petitioner that his intended wife had tuberculosis, the following cross examination was directed, (Case p. 122):

“Q Just one question, doctor? A Yes?

Q Why, if all you wanted to tell Goldstein was that the girl had a cold, or the kind of a cold you said she had, and not a tuberculous condition, couldn't you do that by telling it to us in plain words without drawing a diagram? A No, I couldn't. Because I was trying to explain the mechanical reason for *that cold* occurring, and I had to draw it.

Mr. Unger: I see, that is all."

(Of course such testimony was damaging to the defendant and had thrown the doctor's evidence into confusion and contradiction. The Vice Chancellor evidently appreciating this asked a question which produced the following (Case pp. 123-128):

The Court: Now, before you leave the stand doctor, I want you to tell me exactly what you said when you went downstairs and talked to Mr. Goldstein. Did you refer in any way to any tubercular condition, past or present?

The Witness: Yes, sir.

The Court: Well, now tell me what you said exactly—

The Witness: I took out—

The Court: About tubercular conditions.

The Witness: I took out my prescription pad, I had my bag with me, took a pencil and made a sketch of the thorax, put in the lungs, showed with my sketching the way the lung was collapsed—the tuberculous lung was collapsed, appearance of the fluid, the impression I had of the thing being healed up, the way the the thing re-expanded and pulled the heart and trachea and mediastinum into the left thorax.

The Court: This was this time before he was married?

The Witness. That was in February, 1928.

The Court: And then you explained to him that she had had a tubercular condition?

(Here again the Court unwittingly gave the witness a cue relative to a "tubercular condition.")

The Witness: Well, I—

The Court: But, in your opinion it was healed, is that right?

The Witness: Yes, sir.

The Court: Are you sure about that?

The Witness: Yes, sir.

Mr. Unger: Pardon me, if your Honor please, the witness did not say what your Honor asked him, and I call your Honor's attention to it as to the accuracy, at this time: he did not say he explained to him that she had a tuberculous condition.

The Court: I asked him to tell me everything that he said about a tubercular condition. Now, perhaps he ought to amplify that.

I want to know what you said to this man as to her tubercular condition.

(And again the leading question of the Court produced a change in the testimony of the witness.)

The Witness: I made a sketch of the thing showing—

The Court: What did you say? You made a sketch?

The Witness: And then I said "Here is this tuberculous condition." and it was collapsed in the thorax and had completely healed up, that we allowed it to expand, that it had pulled the heart and mediastinum and trachea and things into the left thorax, and this was just a mechanical change which caused the retention of the organisms and bronchia which produced an acute thing there that would completely subside, there was nothing to worry about, I assured the family, they were the ones—
(Interrupted).

The Court: No.

The Witness (continuing): —that were —that she would be all right.

Q I think I have heard you tell this two different ways? A Very well.

Q I will ask you once again. You said you took out your pad? A Yes.

Q And you made a sketch of the lung and you showed a lung collapsed; is that right? A Yes, that is right.

Q Did you tell him that was due to a tubercular condition? A Well, I don't remember the exact wording that I said, but—I couldn't remember the exact sentences that I said—I mean, the substance of my talk was that it was a tuberculous lung that had recollapsed that had re-expanded and pulled the thing out.

Q Now, you tell us the substance of your talk. The substance of your talk may have indicated one thing to you as a doctor and something else to Mr. Goldstein as a layman? A He is a lawyer, sir, he is not—(Interrupted).

The Court: Do not argue with counsel, just answer questions.

The Witness: I am sorry.

Q Did you explain to him the significance of the collapse of the lung, what it meant? A It had been finished sir. That was a finished thing. No, I did not go into any details at all, except make a rough sketch and marking it out.

Q You wanted to assure him that there was nothing to worry about? A Yes, sir.

Q From what you had stated before or what you told him, namely, that she had a bad cold and there was nothing to worry about.

Mr. Lane: I object to that, that is not true. That is not all she said.

The Court: No.

Mr. Unger: If it is not, he can answer the question for himself.

The Court: Very well. I will allow it.

The Witness: I said her present condition was nothing but a cold and had nothing to do with the process in her left lung that had previously existed.

Q Did you tell him— A Yes, sir.

The Court: Wait a minute.

Q *No. Did you tell him in so many words that she had or was in one of the stages of tuberculosis? A Well, physicians do not put it that way particularly.*

Q Did you put it that way, doctor? A I put it the way I—

Q Please, doctor, you can answer questions because you have indicated that in the answers you have made to your own counsel. Now, I hope you can answer mine just as well. A Yes, I will. I told the man that he had—(Interrupted).

Q Pardon me. Won't you answer the question? A What was the question?

Q (Question read as follows: 'Did you put it that way, doctor?') A I didn't put it in the form she was in the stage of tuberculosis. I didn't answer it that way.

Q Did not tell him she had tuberculosis? A I did tell him she had tuberculosis.

Q What word did you use? A I said she had had a tuberculous process in which the lungs had been collapsed and the lungs had re-expanded and the pleura thickening pulled the mediastinum and things into the left thorax.

Q Didn't you say within the last ten minutes that you did not use the words "tuberculous process" to him at all, when I asked you? A No, I didn't say that.

Q You are willing to stand on your testimony as you had it recorded here? A Well, I wouldn't want to stand on my testimony, but I will stand on my knowledge of the thing that I did not.

Q I am speaking not of your knowledge but what transpired at that time. A I

did say that she had had a tuberculous process in which the lung had been collapsed, sir.

Q And you want us to understand that you told him that? A Yes, sir.

Q In so many words? A Well, I don't just remember—if someone would explain to me if I have to answer—I don't know whether it is the exact wording I used; I wouldn't remember that.

The Court: Or words to that effect?

The Witness: Yes, sir; words to that effect, I did.

Q Now tell us what you said. A I said that the patient had had a tuberculous process in the lung which—in which the lung had been collapsed and we allowed the lung to come out, there had been a thickening of the pleura—and the lung—and the thickening of the pleura, pulling the mediastinum into the left thorax and the trachea into the left thorax, causing a distortion of the bronchia.

Q Then you wound up by telling him that there was a cold? A I didn't say that there was a cold.

Q Well, that she had a cold? A I said at the present time she was suffering from a good cold.

Q And there was nothing to worry about? A Exactly.

Q Although you were taking pains to explain to him that she had a tubercular condition? A Yes.

Q And do you say now that you used the word "tubercular" or "tuberculosis" to him? A I did in that way.

Q Not "in that way" directly. A You see what I mean. I don't know—words to that effect.

Q I want to know whether or not you used the word "tubercular or tuberculosis." A I never use the word "tubercular" when I mean "tuberculosis."

Q What is that? A I never use the word "tubercular" when I mean "tuberculosis." "Tubercular" means diseases like tuberculosis.

Q What I am asking you is whether you used either of those words to him? A Yes, sir.

Q You say you did? A Yes, sir.

Q And then you characterized the whole thing as a cold? A Don't say the "whole thing" you are rather unjust that way. I said she was suffering at that time from an acute cold.

Now to sum up and recapitulate Dr. Ornstein's testimony. He said, Case p. 101, l. 23—That there was no worry about a tuberculous condition—it was just a cold and would blow over and the defendant would get well.

Case page 118, line 37—Just a cold.

Case page 119, line 15—Not a tuberculous process—just an acute cold that was bothering her at that particular time.

Case page 119, line 20—Not a tuberculous process.

Case page 119, line 22—Only an acute cold.

Case page 119, line 25—An acute treachel bronchitis.

Case page 119, line 28—not a tuberculous condition.

Case page 119, line 29—and she would be all right soon.

Case page 124, line 18—and then I said—"Here is this tuberculous condition."

Case page 125, line 1—I don't remember the exact wording that I said * * * it was a tuberculous lung that had recollapsed."

Case page 126, line 29—Told him she had tuberculosis * * * a tuberculous process in which the lungs, etc. * * *

Case page 127, line 8—a tuberculous process.

Case page 127, line 32—Didn't say there was a cold * * * said she was suffering from a good cold.

Case page 127, line 38—was taking pains to explain to petitioner she had a tubercular condition.

Case page 128, line 1, *et seq.*—used words "tubercular" and "tuberculosis" in talking to petitioner.

Thus the Doctor succeeded in testifying that he told the petitioner two things each diametrically opposed to the other, viz.:

(A) That his intended wife had *an acute cold not a tubercular process, and that she would be all right soon,*

and

(B) That she *had* a tubercular condition.

Such apparent confusion, contradiction, and evasion should have induced the Vice Chancellor to disregard the Doctor's testimony as worthless, and entitled to no credence. We have submitted its high spots. This court will read it in detail and we contend that there are many reasons which justify this court in disregarding it as having no probative force.

The examination which Dr. Ornstein made of the defendant on the occasion of this visit was late at night. Note how he corroborates in every detail, the date, the lateness of the hour and the other particulars of the above extract from the petitioner's testimony. The only dif-

ference in the testimony is his statement or statements as to what he alleges he told the petitioner about her tubercular condition and which, of course, the petitioner has flatly denied. Let us weigh the probabilities. According to the defendant's own testimony, she had not seen fit to tell the petitioner that she had suffered from tuberculosis until February 1, 1928, she being then the sweetheart and lover of the petitioner, and already engaged to marry him. Dr. Ornstein, a perfect stranger to the situation, now comes upon the scene and volunteers to convey such distressing news to the petitioner. He does not know how long the petitioner has known the defendant. He does not know how strong the tie of love is that binds them together. He does not know anything about the nature or temperament of the petitioner or what psychological reaction this revelation may have to the petitioner. He does not know whether the petitioner may grow irate and renounce the engagement to marry. He was not told by the defendant to tell the petitioner. Very nobly, unsolicited by the defendant, he becomes solicitous of the welfare of the petitioner and he decides to tell the petitioner of this fact. Note this question and answer (Case pp. 116-117):

Q And do I understand that unsolicited you proceeded to inform him of the condition of this girl? A Yes, I did, because I thought he was—he might have been alarmed that it was a tuberculous process that cropped up. * * *

Q Because you thought he ought to know? A I did, sir.

Q And not because she told you that she wanted him to know. A She told me that I may tell him. * * *

Q Well, did she make a request of you that you tell him? A No, she didn't make a request for me to tell.

Now, isn't this a very unlikely thing, a very unusual thing? Why was it Dr. Ornstein's business to tell the petitioner of this important fact, when from the entire testimony in the case, it appears that until February 1, 1928, and after the engagement, the defendant did not see fit to tell him. As will later be shown, Dr. Greifinger, her own brother, did not see fit to tell him, as he alleges, until May, 1928, which fact is denied by the petitioner. There is no testimony to show that any of her parents or any other members of her family told him about this tubercular condition. *Why did not some other members of her family tell him? They were closer to the situation.* Why did none of them take the stand and testify that they had told him? *Why did not her father, who was present at the time Dr. Ornstein alleges he told the petitioner about the tubercular condition, take the stand?* There is only one conclusion and that is inescapable: that Doctor Ornstein deliberately perjured himself and was used as a witness for the express purpose of lending an impartial air to the defendant's case. But a reading of the testimony concerning Dr. Ornstein's interest in the defendant will disclose that Dr. Ornstein was not the stranger he wanted the Court to believe him to be. According to the petitioner's testimony, the defendant was treated by Dr. Ornstein not as a professional patient but as a friend of the family. The families of the defendant and Dr. Ornstein knew each other socially. Dr. Greifinger had studied under Dr. Ornstein. Then again, observe, that this visit took place late at night. Note the petitioner's testimony that Dr. Ornstein was in a terrible hurry to get back to New York City and so expressed himself when he came downstairs, and then reconcile these facts with his testimony that he sat down and took all the

time to make all the explanation that he testifies about, to make a diagram, about the trachea. *Yet nowhere in his testimony does he disclose the petitioner's reaction to this revelation. Certainly, such news must have affected the petitioner to such an extent as to make him inquisitive or else at least express himself in some way or another.* Yet, nowhere does this appear in his testimony. A logical reason for this was that there never was any such explanation given to the petitioner.

(B) In January, 1929, after the marriage, the petitioner brought his wife to Dr. Ornstein's office for examination and the doctor testified at great length (Case p. 105, *et seq.*) that he went through the "same explanation" of things again; that he brought petitioner into the consulting room, made sketches, went over the thing again—that petitioner was "very meek and quiet and seemed to be perfectly satisfied with the examination." The doctor spoke of the thickening of the pleura, that pulled her heart and mediastinum and trachea and bronchia into the thorax, etc. This was evidently a real examination and we refer to it here only for the purpose of suggesting that what the doctor *found* at this examination *after* the marriage, is what he endeavored to make the Court believe he *explained* to the petitioner *before* the marriage. In other words, the doctor simply transposed the events in order to make the testimony fit the occasion of the visit before the marriage.

In connection with this second visit, Dr. Ornstein and Dr. Greifinger both claim that the petitioner was told of the above facts in connection with his wife, *and both say he made no comment.* Now, can one imagine a person being told by a physician that his wife and the girl he had just

married was suffering from tuberculosis and that person failing to say a word. Would it not have been the most natural thing for Mr. Goldstein to question these physicians and ask Dr. Ornstein those questions that a person might ask under the circumstances as to the nature and extent of her disease, what the probabilities of a recurrence were, what the probabilities of having children were, and other questions which would naturally occur to the ordinary layman. This would have been the most natural thing for any person to do under those circumstances. Yet, neither Dr. Ornstein nor Dr. Greifinger explained or stated any reaction that the petitioner made upon being told the alleged facts which Dr. Ornstein testified to.

On page 171 Dr. Greifinger testified as follows (referring to the length of time Dr. Ornstein spoke to Mr. Goldstein, on the occasion of the visit Dr. Ornstein made in February, 1928, before petitioner's marriage to defendant, and about which full reference has been made above):

“Q How long did he talk to Mr. Goldstein? A A few minutes.”

Contrast this statement with Dr. Ornstein's testimony when he states that he came down from the room in which he had examined Mrs. Goldstein, about 10:30 P. M., and did not leave until about midnight. If Dr. Greifinger's statement is true, how could Dr. Ornstein explain everything he states he explained to Mr. Goldstein, in such a short space of time, and at the same time leave him with that pacified and satisfied assurance that everything was well and that the petitioner had nothing to fear about the tubercular condition of the defendant, possible recurrences and other things about which a layman

might want his fears allayed? The answer is that *not a word* was said by either one of them about tuberculosis, a tubercular condition, or anything to that effect, or anything that might be calculated to give Mr. Goldstein to understand that the defendant had a tubercular affliction. The whole testimony of both witnesses in this respect is purely a fabrication and something that is unbelievable by any person who knows human nature and understands human conduct and human psychology.

Dr. Edward I. Gluckman, Dr. Lawrason Brown and Dr. Henry Leetch each testified that the defendant had an advanced case of tuberculosis. Dr. Brown testified that in July, 1929, several months after the defendant had been at Saranac Lake, the disease had increased and had even extended into the right lung. Dr. Lawrason Brown is recognized as the foremost tuberculosis expert in this country and was the teacher of Dr. Ornstein, as appears from the testimony. He was likewise the teacher of Dr. Gluckman. His opinion as to the condition of the defendant should carry the greatest weight. Yet, Dr. Ornstein disagreed with this gentleman. Doctors Gluckman and Brown testified that the defendant had an infection of the right lung, but Dr. Ornstein again disagreed. Doctors, Brown, Leetch and Gluckman testified that tuberculosis is a chronic relapsing or recurring disease; but, again Dr. Ornstein disagreed. Bear in mind that Dr. Leetch is a physician who actually attended the defendant. Does this not clearly indicate that Dr. Ornstein took the stand in behalf of the defendant as an "expert" witness for the sole purpose of distorting the true facts and the true situation and to spare nothing in an endeavor to win the case for the defendant?

Now, we come to the testimony of Dr. Greifinger, brother of the defendant, the only other witness produced by the defendant to show that the petitioner had knowledge of the tubercular condition of the defendant, prior to marriage. Dr. Greifinger, on page 161, *et seq.* testified that he knew the petitioner seven months prior to the marriage; that he was present at the engagement (December, 1927) that she went to bed in January, 1928, for five or six weeks, and that in May, 1928, *after* the engagement, while he and the petitioner were discussing the latter's plans for a honeymoon he told the petitioner that his sister was "an arrested case of tuberculosis."

Now the query arises: Why, if Dr. Greifinger wanted the petitioner to know, had he not told him this a long time prior to May, 1928, which was only one month before they were married? Why did he defer telling the petitioner until after the formal announcement of the engagement? Why did he wait until the honeymoon plans were discussed? Suppose the honeymoon plans had not been discussed on this particular occasion and in his presence? In view of the fact that he deferred telling the petitioner until such a late date, isn't it reasonable to assume that if a honeymoon were not discussed in his presence, that he never would have told the petitioner? Isn't it reasonable to conclude that he never intended to tell the petitioner and did not tell the petitioner, but, on the other hand, lacking any other time, place and occasion to hang his testimony on, he chooses to color his testimony with these honeymoon plans?

Contrast Dr. Ornstein's solicitous attitude as disclosed by his testimony, and that of Dr. Greifinger, the defendant's own brother!

Dr. Ornstein, a stranger, if he is to be believed, says he told the petitioner in February, 1928, and Dr. Greifinger, a brother of the defendant, with whom the petitioner had many contacts prior to May, 1928, did not disclose it to him *until May, 1928*. This testimony in itself shows clearly that the testimony of Dr. Greifinger is to be wholly disregarded.

Now there is a sharp difference of testimony on another score.

The petitioner testifies that on February, 1929, he went to Saranac Lake to make arrangements for an independent examination of his wife by Dr. Leetch (Case p. 34) that the defendant's brother, Dr. Greifinger, interfered with the examination by interviewing Dr. Leetch in advance and that on February 22, 1929 (Case p. 37), the petitioner arranged for another examination with Dr. Leetch and Mr. Plant an X-ray man. On this occasion petitioner was shown X-ray plates bearing the maiden name of his wife and dates two or three years old thereon (Case p. 38) and then and there Doctor Leetch in answer to the petitioner's question said that the defendant had tuberculosis and had been suffering from it for the last two or three years—the exact testimony is as follows (Case pp. 38-40):

“I was so amazed by seeing the dates, some of them running into 1927, some during the time I was courting her, all showed that she had been examined periodically for two or three years prior to the time that I married her. I made no comment in the X-ray room, I simply listened because I felt there

was no comment for me to make, as long as the X-ray man was talking at the time; and the X-ray man pointed out to Dr. Leetch that she had a very large cavity; he pointed to a certain area on the plate that indicated a large cavity in her left lung. After we were through in the X-ray room, we entered Dr. Leetch's office. He was using Dr. Mayer's room at that time. Mr. Plant left the conference and Dr. Greifinger, Dr. Leetch and I were the only ones present at this conference. We seated ourselves and I told Dr. Leetch that I wanted to ask him some questions. I says, "Doctor, has my wife tuberculosis?" He says, "Yes." I says, "Are you sure about it? Is there any question about it?" "No question at all about it." I says, "Doctor, can you give me an idea how long my wife has suffered from this condition?" He says, "Well," he says, "from the X-ray plates that I have just seen I would say that she had been suffering from tuberculosis at least for the last two or three years." I says, "Has she got a very serious condition?" He says, "She has a very bad condition in the left lung." I told him that I heard Mr. Plant make some remark about a cavity in the left lung and I asked him what that cavity condition was. He told me she had a very large cavity, indicating by his fingers that her cavity was at least an inch square in dimensions. I asked him how long, in his opinion, a cavity of that size would take to heal and he told me a very long time. In fact, he told me it might become necessary to perform some surgical operation. I told him that I had never known the treatment of tuberculosis at any time called for surgical operations and he told me, "Yes," he says, "It may be necessary to perform an operation to relieve the pressure on the lung." I asked him whether he was sure that such an operation might become necessary and he told me it was hard to say, he would wait about two or three months to see how she progressed. I asked him how

long he thought that she would be up there. He said, "The way I figure," he says, "She should be up here about a year, unless she makes unusual progress." I then asked him whether, in his opinion, it was a wise thing for Reggy to have married me. He said, "Well, it is hard to say, but," he says, "I guess it might have been better for her not to have married you." I asked him other questions of a similar nature and after I had gotten through—and, frankly speaking I really conducted a very rigorous examination of him for a period of about a half hour or so—after I got through, her brother in an attempt to relieve the tension of the situation said, "Well, doctor—(interrupted).

Q Proceed. A After Dr. Greifinger had made a remark that I subjected Dr. Leetch to a very vigorous cross examination, I said to Dr. Leetch in a very—I seemed to be very angry—I was very angry at the time, I said, "Doctor, this is the first time I have been able to get any information as to the nature of my wife's illness; this is the first time I have learned that my wife has tuberculosis." I said, "This fellow sitting here—" pointing to her brother, Dr. Greifinger, "and Dr. Ornstein have both been telling me all along that my wife only has bronchitis or a very severe condition of bronchitis." I said, "I think it is a shame that doctors will conceal any condition of that kind." I said, "By doing that they have deprived me of my independent judgment as to what course of action to pursue in the treatment of my wife." I said "I think they are both a disgrace to their profession." Dr. Greifinger sat by and he didn't say a word. In fact, during the entire conference with the exception of the remark he made that I had subjected Dr. Leetch to a vigorous cross examination, he didn't say a single word, he simply sat there ashen white, and made no comment at all. Well, then we got out of the conference room it was then already about five o'clock or so that after-

noon. We both wanted to go up and see my wife; we were walking up to the Saranac, and I refused to walk with him. I told him I didn't want to have anything to do with him. We went up to see my wife and she asked me what Dr. Leetch had said. I told her that Dr. Leetch had said that she would be well in a very short time—I didn't want to cause her any alarm—that she had nothing to worry about, a little patience and courage and she was to be well shortly. That night we left for Newark and I returned to my office the following morning.

Q After that you brought this suit? A That same day that I returned from Saranac Lake I saw you, Mr. Unger, and I retained you for the purpose of bringing this annulment action."

Of course Dr. Greifinger denied all of these allegations particularly the fact that he had been criticized and characterized by the petitioner, but Dr. Leetch a disinterested person corroborated the petitioner when Doctor Leetch testified as follows, with reference to that incident (Case, p. 270) *et seq.*:

Q Do you know whether or not anything happened on that occasion to indicate whether Mr. Goldstein, the petitioner, had ever been informed of the condition of his wife?

Mr. Clancy: I object to that; in the first place it is leading, and it calls for a conclusion.

A Mr. Goldstein expressed extreme surprise to me and to Dr. Greifinger that Mrs. Goldstein had tuberculosis.

Q Do you recall in what manner he expressed surprise? What did he say?

Mr. Clancy: I object to that for the same reason.

A He obviously—I don't recall his exact words, *but he expressed considerable anger at Dr. Greifinger.*

Q What was Dr. Greifinger's reaction in response to his expressions of anger? A Very little.

Q Did he make any explanation of the seeming lack of knowledge on the part of Goldstein as Goldstein expressed it?

Mr. Clancy: The same objection to that.

A No.

Q Did he say anything in contradiction of Goldstein's statement that he had not been apprised before that time?

Mr. Clancy: I object to that for the reason it is hearsay and not made in the presence of the defendant, and it calls for a conclusion.

A I don't recall.

Q You mean you don't recall that he said anything? A Yes.

Q And there is nothing that you recall that he did say? A No. My general impression of the whole conference was that Mr. Goldstein was doing most of the talking.

We have gone into considerable detail in discussing the testimony of the defendant and the different witnesses produced by her to show how clearly impossible, or rather improbable, it was that the petitioner would marry the defendant or that any man, under similar circumstances and conditions, would marry a woman similarly afflicted.

In discussing this testimony, this Court can readily appreciate how important it is for the Court below to have carefully observed the demeanor and conduct of these witnesses. The defendant herself gave the testimony in a way that clearly indicated that it had been prepared for dramatic effect. More often than not, her answer was ready and off her tongue before a question was propounded to her. Her answers

were so glib as to indicate, beyond any uncertainty, their falsity.

As for the testimony of Dr. Ornstein, it is hard to depict his faltering tongue but, literally speaking, he faltered his whole way through his entire testimony. Even the printed record will show that. He had every ring and earmark of insincerity and untruth. One could not help but gain the impression that he was making every attempt to conceal the falseness of his answers. Yes, every word that he spoke carried its own marks of untruth.

As for Dr. Greifinger, his evasive and equivocal answers speak for themselves, but his appearance and attitude on the stand was even more incriminating, to say the least. Sheepishly he mumbled out his answers in a dull monotone. It would not have taken any student of human nature very long to see that these witnesses were not telling the truth and to characterize them as lying.

In sharp contrast to these witnesses was the testimony of the petitioner. His testimony (and the examination and cross examination show it) carried a certain conviction and ring of sincerity, a certain precision and accuracy that immediately stamped it as truthful. All of this discussion about this testimony of all of the witnesses deals with the suppression of the truth from the petitioner. The testimony also shows that there was an express representation made by the defendant shortly before her marriage, that she was a healthy girl and fit to marry. This testimony was given by the petitioner and not denied by the defendant.

The Court below erroneously concluded that the petitioner tired of the defendant because he could not secure money from her, and that this, perhaps, motivated him in bringing the annulment proceedings.

Often, in these annulment cases, an attempt is made to show that the petitioner has some ulterior motive in bringing the action. In the case at bar, the defense went on a fishing expedition to supply such a motive, and the cross examination of the petitioner and Dr. Leetch indicates various motives which they attempted to supply but finally, the defense saw fit to supply the fact that the petitioner had not received any money from the defendant, as the motive for leaving her and seeking an annulment. *But (Case, p. 41) the day after the petitioner learned definitely that his wife had tuberculosis and had had tuberculosis, he instructed his counsel to bring this action.* What better indication can there be than that this was his only motive in bringing the action, that is, to annul the marriage because of her fraudulent concealment.

As to a money motive note the examination of the petitioner on (Case pp. 80-81-82) showing that he never asked for or received any money from her, and the testimony of the defendant on page 205, shows that the defendant never gave her husband any money.

This is about all the testimony there is in the entire proceeding about money, stock, or the manner in which the petitioner supported the defendant. Apparently, the defense pursued this examination with the idea of showing that the petitioner had lost large sums of money in stock or was in dire need of money, and attempted to borrow money from the petitioner, or that he had

failed to support her, etc. But, query: Where does the above testimony show this to be so or where is there anything else in the testimony that shows this to be so? Usually, when young couples separate shortly after marriage because of money troubles, it is a case of where there was an express understanding that the young man had been promised a dowry, did not receive it and consequently separated. The testimony does not indicate anything of the kind. No dowry had been promised to the petitioner, nor did he get or expect any. The few gifts referred to above which he did get, are all that he received and there is no proof anywhere in the testimony that he had ever expressed any dissatisfaction about the same or about the failure of his wife to give him any money. Certainly, there is no proof that would sustain the conclusion of the Vice Chancellor and we are frank to say that we believe that the learned Vice Chancellor permitted this obscure and uncertain testimony of the defendant to becloud the real issue and to furnish him with a basis for the decision he made in this cause.

Counsel for the defendant dwelt at length (Case pp. 83-82) about a certain check incident as set forth on page 92 of the cross examination of the petitioner, apparently in an effort to show that the petitioner was so hard pressed for funds that he had to borrow the sum represented by this check. The petitioner not only explained this check but when he produced his own check for \$150 which he gave to the petitioner very shortly thereafter, he abandoned this line of examination, realizing undoubtedly that it would not get him anywhere. Now, all this testimony about money shows, beyond a doubt, that money had nothing to do with the

separation of the petitioner from the defendant. The testimony shows that the petitioner is a successful young lawyer, earning a good income, and had provided well for his wife and apparently he was in a position to meet all the financial obligations that attended matrimony.

Observe the following cross examination of the defendant (Case p. 209):

Q Well, he came up to see you in February of 1929, this year? A Yes, sir.

Q And on that occasion you were examined by Dr. Leetch, I think; is that right—? A February, yes—

Q You were on perfectly good terms with your husband, weren't you? A Yes.

Q You were still in love with him? A Yes.

Q And you wrote him very endearing letters? A Yes.

Q And he sent you the money to pay your hospital attendance or sanatorium care up there? A Yes.

Q Paid for your doctors? A Yes, sir.

Q And he had not in any way proved deficient up to that time, had he? A No, sir.

Q You were counting the days when you were going to come back? A I was.

This negatives every complaint she says she had against him.

Now, here is a perfectly logical question to ask: Assuming for the moment that it is true that the petitioner knew prior to marriage that the defendant suffered from tuberculosis; assuming also, as Dr. Greifinger testified, that it would be dangerous, in view of the tubercular condition of the defendant, that she should bear children and assuming the petitioner was so informed, is it not nevertheless, true that if the petitioner married the defendant, in the face of these circumstances, it would be an example of

heroic love? If a man were to marry a woman under these circumstances and be willing to make such a tremendous sacrifice because of his love for this woman, is it reasonable to assume that within *such a short time* after marriage, he would tire of her because of money, itself, and that he would separate from her and abandon her in such a time of distress, particularly when the proofs are that he had financial means of his own and was well able to carry the financial burdens of matrimony? There can be no logical deduction under such a premise, that a man would permit money to bring about a separation from his wife under these circumstances. The petitioner, contends that he never knew, prior to marriage, or prior to February 24, 1929, that she had tuberculosis and that had he known prior to marriage that she had been afflicted with the same, he never would have married her. In other words, the petitioner's testimony is to the effect that he was defrauded and that any love that existed between the defendant and the petitioner was built on a false premise. This is the very essence of the action brought by the petitioner and it is submitted that all the testimony, not only of the petitioner, but even of the defendant and the witnesses produced by her, shows clearly that the petitioner was defrauded and is entitled to have a decree annulling the marriage.

Furthermore, the defendant attempted in her testimony to show that the petitioner had frequently threatened her with divorce and annulment. How she can reconcile this fact with the ardent love that seemed to exist between the parties to this marriage up until the time of the actual separation is beyond human understanding. In any event, the petitioner contends that

these allegations are entirely a fabrication. It will be recalled in the cross examination of the petitioner, he was asked whether he had not, on frequent occasions, brought law books home with different decisions, citations and authorities, to show the defendant that he could annul the marriage if he chose. The petitioner very squarely met this allegation by stating that all the law books that he had ever brought home were still in the defendant's possession and he challenged the production of any books that would indicate the truth of her testimony in the slightest degree. These books were never forthcoming nor produced by the defendant. Furthermore, the testimony of Dr. Leetch on this point is very essential. He testified that the defendant, in telling him (her own physician) about the probable cause of this last illness from which she suffered, the one that commenced in September and which continued into the middle of 1929, was that as she related to Dr. Leetch (Case p. 259) she had been doing "too much for her strength." Isn't it more likely that such is the truth rather than her wild allegations that her husband taunted her with divorce and annulment and bothered her about money matters and numerous other things?

The suppression by the defendant of the fact that she was suffering from tuberculosis of the nature that she was, for the reason that she did, is equivalent in law to an express representation on her part that she was free from it.

At the conclusion of the case (Case p. 225) Counsel for the defendant in making his argument, endeavored to apply the case of *Beuchler v. Simon* (7 N. J. Adv. Rep. 697), to the present situation.

It seemed to be the contention of counsel for the defendant that under that case the petitioner was obliged to show that the defendant made false representations regarding her ailment and unless this was proved the petitioner could not prevail. In the last mentioned case Vice Chancellor Bakes held that in order to annul a marriage contract on the ground of fraud where a spouse at marriage suffered from a nervous malady which predisposed her to nervous breakdowns and insanity during attacks and as a result of which she had been previously committed to an insane asylum, it must be established that she deceitfully concealed her condition. He said that it was not a deceitful concealment and a ground for annulling a marriage contract if such person unintentionally failed to disclose that twenty years before marriage she had had an attack of insanity, where she believed she had been under treatment for a nervous breakdown and discharged as cured. It appeared in that case that the breakdown and a confinement in an asylum had been over twenty years before. In this case the petitioner *knew* she had tuberculosis and had been treated for it practically down to the time of the engagement. In the Beuchler case Vice Chancellor Backes said on page 969:

“The jurisdiction to relieve for fraud and the petitioner’s right to relief must be found in deceitful suppression of the truth. The suppression must have been wilful, with intent to deceive. The equitable acceptance of fraud, that a harmful untruth though innocently uttered is fraudulent, as explained in Cowley v. Smith, 46 N. J. L. 380, is not pertinent, for the defendant made no representations. Silence, resting in honest belief of things false, is not actionable at law or in equity. All the cited cases of annulment

rest on deceit. Carris v. Carris, 24 N. J. E. 516; Crane v. Crane, 62 N. J. E. 21; Allen v. Allen, 85 N. J. E. 55; Davis v. Davis, 90 N. J. E. 158; Bolmer v. Edsall, 90 N. J. E. 299; Ysern v. Hortdr, 91 N. J. E. 189; Dooley v. Dooley, 93 N. J. E. 22; Steerman v. Snow, 94 N. J. E. 9; Daniels v. Margulies, 95 N. J. E. 9; Gruber v. Gruber, 98 N. J. E. 1."

Applying the rule therein stated, it is easy to see that in the case under consideration, Vice Chancellor Backes was dealing with a situation where he was satisfied that the defendant did not regard her malady as a disease or the result of a disease, and that she was not aware that her nervous breakdown was an attack of insanity, if it was. He said that such a mishap could be laid to over-work or shock. That is not the case at bar. In the one before the court the defendant *knew* that she had tuberculosis. If the contention of counsel for the defendant that *Buechler v. Simon* is authority for the proposition that an actual representation that the defendant was free from disease was necessary, then all of the cases cited by Vice Chancellor Backes, *supra*, must have been deemed to have been overruled. This cannot be so, because among them is *Davis v. Davis*, 90 N. J. E. 158, in which the concluding words of the opinion are as follows:

"The suppression by defendant of the fact that he was suffering from tuberculosis of the nature that he was, for the reason that he did suppress it, is equivalent in law to an express representation on his part that he was free from it."

This case has been continuously cited, and in *Gruber v. Gruber*, 98 N. J. E. 2, the Chancellor said that the fraud for which a marriage will be annulled, may be either *suggestio falsi* or *suppressio veri*, citing *Steerman v. Snow*, 94 N. J. E. 9. The said last mentioned citation contains a

reference to the case of *Turney v. Abery*, 92 N. J. E. 473, in which Chancellor Walker on page 474, says:

“False pretences are of two kinds—*suggestio falsi*, or affirmative false representation, and *suppressio veri*, or withholding the truth when it should be uttered. In *Nicholson v. Janeway*, 16 N. J. E. 285, it was held that undue concealment of a fact to the prejudice of another, which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent, constitutes a fraud against which equity will relieve. See also *Conover v. Wardell*, 22 N. J. E. 492; *Keen v. James*, 39 N. J. E. 527, 540.

The fraud in the case at bar is of the latter sort—that is *suppressio veri*; and as it affected an essential of the marital relation the injured party is entitled to be relieved by annulment of the marriage in this court under its general equity jurisdiction, dissociated from its statutory power to annul for specified cause, *Bolmer v. Edsall*, *supra*.”

It must, therefore, clearly appear that the Court of Chancery has undoubted jurisdiction to nullify a marriage because of a suppression by the defendant of the fact that he was suffering from tuberculosis in the same manner as if he made an express representation that he was free from it. And if this be so, it is very difficult to understand the contention of the defendant that a *suppression* by the defendant of this fact must be corroborated. To uphold such a contention would mean that the petitioner would have to corroborate silence on the part of the defendant. The mere statement of such a contention indicates it cannot be so.

The Court's questions had a tendency to prejudice the petitioner, and this action on the part of the Court, constitutes reversible error since it defeated the very purpose of examining witnesses to ascertain the truth.

Of course not intentionally, but nevertheless effectively, the questions of the court were prejudicial to petitioner. They were leading and many suggested answers calculated to assist the defendant.

In addition to the numerous other instances referred to throughout this brief, other instances are as follows:

(Case p. 101)

"The Court: You informed him in the course of this conversation that the lady had had a tubercular condition?"

The Witness: Yes. I made a *diagram* of the whole thing, sir.

The Court: *Oh, well.*"

The following appears on pages 116, 117:

"Q Notwithstanding the fact that she did not tell you to tell him anything, you decided, of your own accord, to disclose it to him? A Well, I had—

Q No, that calls for yes or no. A I can't answer that way.

The Court: Oh, yes, you can, doctor, You decided to tell him.

The Witness: Tell him.

The Court: Yes.

The Witness: Yes, sir, I did. I decided to tell him."

These leading questions of the Court were clearly improper and gave the witness a clue as to what testimony was desired. It is difficult to portray to this Court just what transpired at this particular time. So far as the witness under

examination was concerned, his lapse of speed, the lapse of time between answers, the perplexity of the witness, and then the statement of the Court when united to extricate the witness from his perplexity. The question propounded by the Court at that moment had a devastating effect upon the efforts of the cross examiner of this witness in his efforts to get the witness to tell his own story as he wanted to tell it, himself. This was repeated (Case p. 127):

“Q And you want us to understand that you told him that? A Yes, sir.

Q In so many words? A Well, I don't just understand—if someone would explain to me if I have to answer—I don't know whether it is the exact wording I used; I couldn't remember that:

The Court: Or words to that effect?

The Witness: Yes, sir, words to that effect, I did.”

In other words, the case had reached this juncture: Did Dr. Ornstein tell the petitioner directly that she had had tuberculosis or a tubercular condition at such prior date? Did he use the words tuberculosis or tubercular condition, or did he use technical language from which he, the petitioner, would conclude that his wife had had tuberculosis or a tubercular condition prior to that date, or had he reduced that technical language to lay language so that the petitioner might make such a deduction even though the words tuberculosis or tubercular condition might not have been used? What Dr. Ornstein claims he told Mr. Goldstein on this particular occasion was the most important event of the trial. The doctor seemed at sea and was, literally floundering about to explain himself, when the Court's questions came to his rescue and the witness easily got his clue and from that

time on, the usefulness of Dr. Ornstein as a witness was completely destroyed. The learned Vice-Chancellor was in error in doing this.

Discussion between the Court and petitioner's counsel finally terminated with the following remarks of petitioner's counsel which appear on pages 227-228.

"This case grows out of those cases which follow *Davis v. Davis*, and which was decided by Vice-Chancellor Lane, and which to say the least, was the first case in the State which came out squarely on the subject of tuberculosis or a concealment of tuberculosis as a ground for nullity of marriage.

Your Honor is probably familiar with that case and I haven't anything more to say in connection with that case than to read the last paragraph in that decision which is this: "The suppression by the defendant of the fact that he was suffering from tuberculosis of the nature that he was, for the reason that he did suppress it, is equivalent in law to an expressed representation on his part that he was free from it."

The Court: Well, of course, the only question in this case is, did this man know that she had tuberculosis when he married her. That is it.

Mr. Unger: Exactly. The point that we —(interrupted)

The Court: That case is not in point at all. This man apparently concealed it.

Mr. Unger: Yes.

The Court: She says she did not.

Mr. Unger: This case is authority for the proposition that all that need be shown is suppression, not a representation. It is not necessary that the fraud be proven against whom it is sought to nullify the decree or that he shall represent that he is free from disease; it is sufficient if the party suppressed the fact he is.

The Court: Well, the whole question here is one of fact in concealing.

Mr. Unger: Yes. I am not quarrelling—
(Interrupted)

The Court: That case has nothing to do with it as far as I see.

Mr. Unger: That case is the authority upon which we bring all these suits.

The Court: Well, all right.

Mr. Unger: That case is authority if I have not made myself—(interrupted).

The Court: Not in this case.

Mr. Unger: If I have not made myself clear to your Honor, that case is authority for the proposition that the suppression of the truth is sufficient.

The Court: Yes, but the question here is did she suppress the truth?

Mr. Unger: Yes, well, I am coming to the facts.

The Court: All right. Go on.

Mr. Unger: I am only referring to this as an indication of what the law is.

The Court: I understand that perfectly.

Mr. Unger: As drawn by a long line of cases.

The Court: I am not interested in that.

Mr. Unger: Because of the fact that they furnish the legal authority.

The Court: There is not any legal authority in that at all. The question is did she suppress the truth.

Mr. Unger: Yes."

Here again, the Court was in error as to the application of the law to the facts.

On page 236 of the Vice-Chancellor's opinion, he states "that he (Dr. Ornstein) explained to him that and this man went on and said 'In spite of that, I will marry her' ". Attention is called to this Court that *nowhere* in the course of the

trial and in the testimony of the petitioner does such a statement appear in the testimony of the petitioner or the defendant, and the Vice-Chancellor already erred in this respect.

With nothing but the highest respect for the learned Vice-Chancellor who heard the case, we feel, however that he was wrong in his views, his findings of fact and his conclusions of law as applicable thereto. If this is so, and the evidence justified a contrary conclusion, it is of the highest importance that the petitioner be no longer bound to a matrimonial obligation which his wife incurred in fraud. The decree of the Court of Chancery should be reversed.

Respectfully submitted,

MILTON M. UNGER,
Solicitor for and of Counsel with
Petitioner-Appellant.

New Jersey Court of Errors and Appeals

Between

GUSTAVE L. GOLDSTEIN,
Petitioner-Appellant,

and

REGINA GREIFINGER, otherwise
REGINA GOLDSTEIN,
Defendant-Respondent.

On Appeal from
Chancery.

Sat below
Church, V. C.

BRIEF OF RESPONDENT.

(Italics, etc., mine, except where otherwise noted.)

Foreword.

This is a fact case. For present purposes I will concede that *Davis v. Davis*, 90 N. J. E. 158 correctly expresses the law that: tuberculosis is one of those diseases, the existence of which so affects the essentials of the marriage contract as that false representation with respect to its non-existence will warrant an annulment of the marriage; the suppression of the existence of tuberculosis by a prospective spouse, which existence was known to the prospective spouse, because the prospective spouse believed that the other would not marry if its existence was known is equivalent in law to an express representation upon the part of the prospective spouse that the prospective spouse was free from it and will warrant an annulment. That was the *Davis* case.

The only case I desire to cite on this subject is *Buechler v. Buechler*, 7 N. J. Advance reports 967, in which the husband sought annulment of

the marriage because of the failure of the prospective wife to disclose that she had been committed to an insane asylum prior to the marriage and had been suffering from insanity which case is mentioned by appellant in his brief (p. 70). Vice Chancellor Backes said:

“The jurisdiction to relieve for fraud and the petitioner’s right to relief must be found *in deceitful suppression of the truth*. The suppression must have been *wilfull*, with *intent to deceive*. The equitable acceptance of fraud, that a harmful untruth though innocently uttered is fraudulent, as explained in *Cowley v. Smith*, 46 N. J. L. 380, is *not pertinent, for the defendant made no representation*. Silence, *resting in honest belief of things false*, is not actionable at law or in equity. All the cited cases of annulment rest on *deceit*.”

And the Vice Chancellor then cites with approval *Kaufman v. Kaufman*, 86 N. J. E. 132.

That respondent had suffered from tuberculosis is conceded. That she believed that she was cured, as that word is popularly understood, is demonstrated.

Even Dr. Brown, a witness produced by appellant says, that in “arrested” cases “some people often use the term ‘cured’, even though they use it in a sense, though they cannot prove that they are correct.”

Had the existence of her previous condition not been disclosed she would have been guilty of no fraud within the language of Vice Chancellor Backes in *Buechler v. Simon*, 7 N. J. Advance Reports 967. But her previous condition *was* disclosed.

Practically the entire 78 pages of the brief of appellant is taken up with an attempt to show that respondent and the two witnesses who testified for her, as to the disclosure to appellant were

perjurors and that the only witness produced for appellant, i. e., appellant himself, told the truth. Appellant is forced, when referring to Dr. Ornstein, to say that the Vice Chancellor should have disregarded his testimony "as worthless and entitled to no credence" (p. 53), and, p. 55, "There is only one conclusion and that is inescapable: that Doctor Ornstein deliberately perjured himself and was used as a witness for the express purpose of lending an impartial air to the defendant's Case."

Dr. Ornstein has been a physician since 1915; since 1919 he has devoted himself especially to tuberculosis; he is a director of the tubercular service at the Metropolitan Hospital, New York City, visiting physician to the Municipal Sanatorium at Otisville, New York, associate professor of medicine, teaching that subject at the new Homeopathic and Flower Medical College, associate of medicine of the Post Graduate Medical School, associate of medicine at the College of Physicians and Surgeons at the Columbia University. He could have gone on but, upon the interruption of the Court, counsel for appellant conceded his qualifications (p. 96).

Appellant would lead the Court to believe that Dr. Ornstein was a friend of the family of respondent (p. 55). The doctor testified, pages 108, 109, that: he did not know them until a Dr. Altman, who had been attending respondent, sent Dr. Greifinger, her brother, to Dr. Ornstein in 1923; Dr. Greifinger brought his sister over for examination; Dr. Ornstein only knew Dr. Greifinger as a physician and had no social relations with him but that Dr. Greifinger "had been to my clinics where he has attempted to have some training in pulmonary diseases, but that is an open invitation to any physician" (p. 109). This is what appellant refers to when he says, page 55: "Dr. Greifinger had studied under Dr. Ornstein."

And Dr. Greifinger, who is the brother of respondent, is called a perjurer with respect to his testimony which he gave as to the disclosure (p. 163), apparently because, as appellant states in his brief (p. 65): “* * * his appearance and attitude on the stand was even more incriminating, to say the least. *Sheepishly*, he *mumbled* out his answers in a *dull monotone*. It would not have taken any student of human nature very long to see that these witnesses were not telling the truth and to characterize them as lying.

And Dr. Ornstein is said (p. 65) to have testified in a “*faltering tongue*” and with every “*ring and earmark of insincerity and untruth.*”

I have examined the record with some care to find the “*sheepishness*” and the “*mumbling*” and the “*faltering*” but I cannot find any one. They did not occur, or at least I did not see them and I was there. Had they occurred the Court below probably would have referred to them.

Appellant has as much right to inject into this record this “*sheepishness*” and “*mumbling*” and “*faltering*” which do not appear, as I would have to suggest that the manner of appellant on the stand clearly indicated that he was a shrewd, resourceful thirty year old young lawyer admitted in 1921, who was using his wits and a knowledge of the law to so testify as to get rid of a woman who had not brought to him the amount of money which he expected. Indeed, my characterization might be more proper than that of appellant for there *is* something in the record to support at least some part of it. See his cross-examination, page 45, *et seq.*, and the judgment of the Court which was to the effect that *he* was the perjurer. And the Court saw the witnesses.

The other perjurer is respondent herself. She was no more interested than was appellant, for appellant concedes, p. 78 of his brief, that the case is of the “*highest importance*” to him.

It is no less important to respondent.

Appellant says, p. 65, that his testimony "carried a certain conviction and ring of sincerity, a certain precision and accuracy that immediately stamped it as truthful."

I do not find the "ring" in the record. I *do* find a certain "precision and accuracy" if, by those terms, appellant means that he testified to the exact legal requirements to get an annulment. It was a "lawyer-like" precision and accuracy.

Respondent is criticised at many points in the brief of appellant (p. 55) for not calling her father as a witness. He was present at one of the times that the disclosure was made. If the father was not called it was the fault of counsel for respondent and not that of respondent. The case had taken long enough and a point came where counsel might well dispense with the putting in of cumulative proof. The father was not concealed. If appellant thought his testimony would help him he might have called him. Two witnesses, besides respondent, had testified to a set of facts which had been met only by the *uncorroborated* testimony of appellant and that would seem to be sufficient.

Finally, in this foreword I direct the court's attention to the statement made by appellant, p. 67 of his brief, where, in criticising the action of the trial court in permitting cross examination of the appellant, designed for the purpose of showing an ulterior motive, he says:

"Certainly, there is no proof that would sustain the conclusion of the Vice Chancellor and we are frank to say that we believe that *the learned vice chancellor permitted this obscure and uncertain testimony of the defendant to becloud the real issue and to furnish him with a basis for the decision he made in this cause.*"

Statement of the Case and Argument.

The petition (p. 2) alleged the marriage on June 24, 1928, and prayed for annulment on the ground of fraudulent concealment by the wife that she was afflicted with tuberculosis, and alleged that, if she had disclosed that fact, petitioner would not have married her. The answer (p. 4) admits that, prior to the marriage, she was afflicted with tuberculosis and alleges that: she was attacked in 1923; after a period of several months she was advised that she had been cured; she suffered from a cold in February, 1928; she was attended by physicians; her husband had full and complete knowledge of the situation before the marriage; she concealed nothing.

The case was tried before Vice Chancellor Church (p. 12). The issue was whether there was any *fraudulent* concealment. It was an issue of fact and the Vice Chancellor decided it at the conclusion of the hearing (p. 235). Counsel for appellant conceded (p. 229), that there was *no misrepresentation* and that the issue was whether there was a *fraudulent suppression of the truth*.

The Vice Chancellor, at p. 235, in deciding the case, first stated that it narrowed down to this: "Did this man know before the wedding—the engagement, the engagement ring means nothing—did he know before the marriage that this woman had suffered from tuberculosis." After considering the testimony, particularly that of Dr. Ornstein, whom he called a distinguished physician, as he was, and who he said had no interest in the case except "perhaps, as having treated Mrs. Goldstein," and who he said "has testified clearly and explicitly," as was the fact, the Vice Chancellor said (p. 236):

"I think and I find as a fact that he (appellant) did know."

The decree followed, dismissing the petition (p. 6) from which this appeal was taken. (Notice of appeal, p. 8, petition of appeal, p. 9.)

Appellant met respondent casually in the summer of 1927 (pp. 13, 185). He took her out and proposed to her about Christmas, 1927 (pp. 13, 185). He gave her an engagement ring February 4, 1928 (pp. 15, 186). Prior to February 4, 1928, she had been confined to the bed for about a month with a cold (pp. 15, 186). She was attended by her brother, Dr. Greifinger (pp. 14, 186, 187). On February 7th, Dr. Ornstein was called in consultation (pp. 16, 99, 100, 163).

Respondent testified (p. 186) that: when appellant came to see her at the end of January, after he had chosen the stone but before he had given it to her, she told him that she had "a cold now; I wish you would wait. I said I had had a *tubercular breakdown* five years ago and I always feared a relapse and I didn't want to make any official announcement until I was sure that this was just a cold and I was going to recover;" she told him that she had *contracted tuberculosis when she was a student at Brown University* (p. 186); appellant replied that "He loved me and that he would marry me if I had a wooden leg."

Appellant admits that respondent was in bed ill practically the entire month of January (p. 14), but says that: he was informed that she had a cold; there was nothing in her condition which indicated that there was anything more than a cold; although she was in bed for a month he thought it was nothing but a severe cold (pp. 67, 68).

Dr. Ornstein, whom I have already identified, says (p. 97) that: he first saw respondent in 1923 when he was summoned to Newark to examine her and found that she had a "tuberculous infiltration in her left lung that was active and in our classification it was a caveous pneumonic type;" he

ordered her to Saranac where a pneumo-thorax was produced to collapse that lung; he saw her in 1925 and examined her and found that the tubercular condition was arrested (pp. 97); as usual with all his patients he asked her to come in for periodical health examinations which she did, between October, 1925, and February, 1928, and at each time he found that the tubercular condition continued arrested (pp. 98, 99); he was sent for in February, 1928, and went over and examined her; he knew that she was engaged; appellant was in the house and, after Dr. Ornstein had made the examination, he saw appellant and advised him that there was nothing to worry about her pulmonary condition; he explained exactly what the situation was; drew a diagram; informed appellant that respondent had had a tubercular condition but that it had been arrested (pp. 101, 102).

A great deal of time was taken on the cross examination of Dr. Ornstein with respect to the difference between "tuberculosis" and a "tubercular condition" (pp. 113, 114, 115) and with respect to whether tuberculosis can ever be "cured" or only "arrested," the net result of which was that it was developed that, while tuberculosis can never be "cured" in the sense that there is never any danger of a recurrence of tuberculosis (for, after all, tuberculosis is infectious and a person never afflicted with it may get it), a case which is "arrested" is considered "cured." In an arrested case there is a divergence of opinion among physicians whether any recurrence of tuberculosis is actually caused by the old condition or by a new infection (pp. 120, 121).

The Vice Chancellor properly treated this examination, p. 236, 237, when he stated that to the lay-mind a "tubercular condition" and "tuberculosis" are precisely the same and it is immaterial

whether Dr. Ornstein, in talking with appellant, used the expression "tubercular condition" or "tuberculosis." *Either expression was sufficient to put appellant upon inquiry.* Dr. Ornstein, on re-cross examination, again described how on February 7th, 1928 he took out his pad and drew a diagram and explained to appellant what the situation was (pp. 125, 126) and stated that respondent had, at that time, only a cold (p. 125) and that that cold had nothing to do with the processes in the left lung which had previously existed (p. 126).

Dr. Ornstein says that the illness she suffered in December, 1928, was not due to the old condition and that her nervousness was caused in his opinion by mental distress and that she returned from Saranac well and that she was symptom free and had gained weight and that the old tubercular condition was not different from what it had been when it had been arrested five years before (pp. 103 to 108). She seemed perfectly well in the court room as indicated by appellant's testimony (p. 55).

Dr. Greifinger, the brother of respondent, testifies that he was present on the occasion on February 7, 1928 and that appellant, Dr. Ornstein and Dr. Greifinger talked together and that Dr. Ornstein explained exactly what the situation was i. e., that respondent had an arrested case of tuberculosis but that her then present condition had nothing to do with the tuberculosis (pp. 171, 172).

Appellant meets this testimony by admitting that he was present on February 7, 1928 and met Dr. Ornstein but that all that Dr. Ornstein said was (p. 16), that respondent had a cold and perhaps an attack of pneumonia.

This Court is asked to pronounce Dr. Ornstein, who is disinterested, and Dr. Greifinger, per-

jurers because appellant thinks that it is *improbable* that Dr. Ornstein would have taken upon himself to explain the situation to appellant (p. 54 of his brief) and appellant says:

“Dr. Ornstein, a perfect stranger, to the situation, now comes upon the scene and volunteers to convey such *distressing* news to the petitioner.”

Dr. Ornstein did *not* volunteer to convey any *distressing* news to the petitioner. He testified that, when he examined respondent, he asked her if she had told her prospective husband about her condition and that she had said that she had and the doctor then said “Well, then, I will go down and explain just what happened and that there is *no need of alarm.*”

According to the doctor's testimony, he went down, not to convey *distressing* news, but to convey *good* news for he believed, as he had been told by respondent, that appellant had been informed that his fiancée had had tuberculosis and the doctor thought that appellant would be worried and the doctor further believed that her then present condition had nothing to do with the old tuberculosis and he took pains to indicate that fact to appellant, and the doctor *now* believes it had nothing to do with the old case (pp. 103 to 108).

The other ground upon which this Court is asked to convict Dr. Ornstein and Dr. Griefinger of perjury is that, according to appellant, the doctor succeeded in testifying that he had told appellant two things which are diametrically opposed to the other—(a) “that his intended wife had an acute cold not a tubercular process, and that she would be all right soon,” and (b) “that she had a tubercular condition” (p. 53).

The doctor's testimony, when it is read as a whole, is quite clear and there is no contradiction

whatever. What the doctor told appellant was that respondent had had a tubercular process and that it had been arrested, and that the cold from which she was then suffering had nothing to do with that tubercular condition. There is no confusion about it. And the doctor still believes that her illness in January, 1928, and since, had nothing to do with the old condition (pp. 103 to 108).

Dr. Ornstein testifies, p. 102, that on June 4, 1928, just before the marriage, respondent went to him and asked him if he thought she should get married and he told her that "I thought she could and I told her to go right ahead."

The husband and wife lived together until at least December, 1928 (p. 27), at which time he says that he first suspected that his wife had had tuberculosis, but Dr. Ornstein testifies that appellant had been present at one of the examinations made by Dr. Ornstein of respondent and that appellant went into the fluoroscopic room and that Dr. Ornstein explained exactly what the condition was (pp. 105, 107, 106).

Dr. Griefinger says that in May of 1928, after the engagement but before the marriage, he had a talk with appellant, who was waiting for respondent to get dressed, and asked him about the plans for the honeymoon and told him that "she was an arrested case of tuberculosis and that he should not make any extensive plans or plans that would wear her out. He spoke of a trip to Europe and I told him that I did not advise it and he insisted on a trip out west by train. I told him if he would make frequent stop-overs and stay for several days to give her a chance to recuperate, it would be all right. I also told him that I did not think it advisable that they should have children for two or three years anyhow and he said that agreed with his plans, anyhow" (p. 163).

Appellant met this by denying the conversation in toto (p. 218). The fact was (admitted) that Dr. Greifinger gave appellant protectors to use to prevent conception (pp. 69-70) but appellant says that that "was my own choice" (p. 69) because he did not want any children "for at least two or three years after the marriage" for the reason that he did not want to be bothered with them (p. 71).

He said that it had nothing to do with any consideration for his wife although "that was probably her own thought in the matter, I don't know."

Respondent testified, as I have already indicated, that, about a week before the engagement was publicly announced at the time appellant told her he had the ring, she told him that she had had a tubercular breakdown five years before and always feared a relapse and that he stated that he loved her and would marry her if she had a wooden leg (p. 186). She also said that, after she saw Dr. Ornstein in May, 1928, and asked him as to whether it was all right for her to get married, *she told appellant about it*. She said that she was examined by another physician, a Dr. Jaso; and that she said to appellant that Dr. Jaso had examined her and did not know that she had tuberculosis until she told him and that appellant laughed (p. 187).

Appellant said (p. 25) that in December, 1928, he came up to her room about nine o'clock one night and heard her sobbing and that she said: " 'Gee,' she said, 'I am so terribly sick', she said, 'I should have never dragged you into this.' She said, 'I should have told you before I married you that I was sick.' I said, 'Well, I know you were sick. I know you had that cold in February,' I said, 'that is nothing bad, there is nothing terrible about that,' that was all she said." He said that

she did not mention the word "tuberculosis" and that he had no suspicion from what she said that she had had tuberculosis.

Note the care that the *lawyer* takes to make this testimony *just fit the case*. He wants a confession from his wife that she did not tell him before marriage so he has her saying "I should never have dragged you into this," but he does *not* want her to say the word "tuberculosis" because he lived with her after that conversation and, had the word "tuberculosis" been used, there would have been ratification after knowledge.

I ask the Court to read his cross-examination on this conversation, page 51. She was sobbing as if her heart would break and "she told me that she should have told me that she was sick before she married me, and that she had dragged me into this thing innocently and now I was suffering for it, or that was about the pith and substance of it. That is all there was to it."

He *consoled* her. Although she told him that she should not have dragged him into it he was not suspicious (p. 53) and yet (p. 54):

"that little girl was so sick at that time, she was coughing so violently, she had such difficulty in bringing up sputum, she had such a fever all the time that it was no occasion or time to discuss with her anything of the nature that you want me to tell you about now, and it never occurred to me to ask her about those things at that time."

Respondent denies that she made any such statement to appellant (p. 189), and says that what she *did* say was that she was sorry she had married and if she had known she was going to be ill she would never have married because it made conditions very bad (p. 209).

In the brief of appellant much is made of the fact that respondent waited until just before the

formal announcement of the engagement to tell appellant that she had had tuberculosis (pp. 26, 27, 28, 29 of appellant's brief).

The answer is found in the opinion of the Vice Chancellor (p. 235):

“A great point has been made of the fact that she did not tell him about this trouble before the engagement. I do not see any reason why she should have told him at that time. He was a mere stranger. She did not know whether he was going to propose or not, and I see no reason why she should have advertised her illness to somebody that was a mere caller.”

In an attempt to corroborate the testimony of appellant that he did not know that respondent had tuberculosis until he was advised by Dr. Leetch at Saranac in February, 1929, Dr. Leetch was asked, in depositions before trial (p. 270), whether, when he told appellant the condition of his wife, there was anything which occurred to indicate that he had ever been informed of the condition and the doctor replied, over objection, that he expressed extreme surprise to the doctor and to Dr. Greifinger (p. 270).

All of this testimony was overruled as pure hearsay (pp. 154, 155, 156) as it was, but it was subsequently admitted (pp. 216, 217) improperly I submit for the reasons there stated, but, assume it is in, how does the statement of Dr. Leetch (p. 270) that appellant expressed “considerable anger at Dr. Greifinger” and the testimony of appellant set forth in full in appellant's brief, p. 60, *et sequi*, to the effect that he was so angry with Dr. Greifinger as that he said “this fellow sitting here”, pointing to Dr. Greifinger, and that he refused to walk in the street with him, square with the fact that, as appellant admits, although the resentment continued, they came back to Newark

the next day in the train together and he had dinner with Dr. Greifinger the night of the day that he would not walk up the street with him and lunch on the way back to Newark (p. 65) and, when they parted, he asked Dr. Greifinger to take his suit case home for him? (pp. 65, 66).

Dr. Greifinger denies that any such conversation took place and says that there was no unfriendliness; indeed, he did not discuss the condition of respondent with appellant at the doctor's office (pp. 179, 180, 181).

That there was no such unfriendliness is clearly indicated, I repeat, by the fact that, not only did appellant come home with Dr. Greifinger upon friendly terms, but also requested Dr. Greifinger, as a *favor*, to take his suit case home. It is hard to believe that appellant would ask this man, against whom he had such resentment, to take his suit case home.

I will refer to only one other element which bears upon the bona fides of appellant's case.

The petition was filed March 21, 1929 (p. 1). On his direct examination appellant testified that: in July of 1929 he went to Saranac and visited his wife (p. 42); she told him that he "certainly must have loved her a whole lot if I could not overlook this illness of hers, that love called for sacrifices"; *he* told her that, under the circumstances of this case, his love did not call for any sacrifice at all and that she had deceived him and had kept from him a condition which, had he known, he never would have married her; she complained because he brought the action but "we talked about other things. I tried to assure her and console her with whatever ways I could under the circumstances and I told her that I was going back to Newark that night"; this was on a Saturday night; she told him that she would appreciate it if he would at least stay the following day and she

prevailed upon him to stay and the following morning he came up and saw her again and she said that she regretted that she had ever married him and the reason for it:

“was that my code of doing things and my ways of doing things *was too perfect*, that I could not overlook any skirking in any individual,”

and

“I says, ‘You should have told me about this condition. Why didn’t you tell me that you had tuberculosis?’ ‘Well’, she said, ‘I did tell you’. I says, ‘You did not.’ She said, ‘Well, didn’t I tell you that I had a *nervous breakdown*’. I said, ‘What does a *nervous breakdown* mean to anybody’ (p. 44).”

I ask the Court to read the cross examination of petitioner on this episode (p. 45). He says he went to “console” her and yet he talked to her in the manner in which he says he did. He says he went because it was “just a *human impulse*” and yet, before he yielded to that *human impulse*, he telephoned his counsel in Newark (p. 59) but he would not tell what the conversation was with his counsel hiding behind the privilege of attorney and client (pp. 59, 60, 61, 62). His counsel attempted to aid him by objecting upon the ground that the communication was privileged. It was pointed out that the privilege must be claimed by the witness. The witness seemed *at first* not to want to claim the privilege and yet, when, after three or four pages of sparring, the question was squarely put to him “What did you say to Mr. Unger,” the witness said “*I think, under the circumstances of the case, your Honor, I will plead the privilege of communication.*”

Why would not he tell the conversation between himself and his counsel? Respondent tells of his

episode and says that: he came to see her without any request upon her part; she told him that she could not believe that he had brought a suit and that she said—"didn't I tell you that I had tuberculosis? How could you do such a thing?" (p. 191). He said: "Don't cry. Put your head on my shoulder. Don't cry."; he stayed until eight o'clock that night; she asked him to go, whereupon he said, "Do you know that this is constructive desertion. You are telling me to leave your bed room'" (p. 191); he came at eight o'clock the following day, Sunday, and, after telling her that he loved her when he married her and still loved her, he stated, at one stage of the proceedings, "I want you to write home to your father and to your lawyer and tell them that I intend to withdraw the case because I love you"; at another time he said he wanted his freedom and that he was going to get it.

This *lawyer*, without the knowledge of his wife's attorney, suing his wife for annulment: goes to his wife's room in Saranac where she is ill and stays with her from morning until eight o'clock at night on a Saturday; returns at ten o'clock the following morning, Sunday, and stays until two and then telephones her from the train (p. 192). The visit was made because he felt a "human impulse," but he extracts from her, as he *says* (p. 44), a statement to the effect that she had told him that she had had a "*nervous* breakdown," and that statement, *supposed* to have been made by her to him during this visit, induced by this human impulse to "*console* her," is *now* urged by his counsel as corroboration of his testimony that she never told him that she had had tuberculosis (p. 41).

Appellant deals with this interview in his brief (p. 35 etc.) and excuses it because, after all (p. 39), she had been his sweetheart and was then a sickly

woman and "Would not any *honorable* human being have done the same thing that the petitioner did under these circumstances?" If any *honorable* human being would, because of a *human* impulse, go to his sick wife whom he was suing for annulment to *console* her, that same *honorable* human being would refrain from using, in his suit to annul the marriage, a statement alleged to have been made by her during that interview that she had told him before marriage that she had had a *nervous* breakdown in contradistinction to an attack of tuberculosis. The standard of honor of this *honorable* human being apparently changed from the date of the interview to the date of the trial. Remember that what *he* testified was said by the wife was relied upon by him in his direct examination as evidence in this case and is now relied upon by his counsel in his brief (p. 41).

There was nothing of *honor* about it and the Vice Chancellor was quite correct when he said (p. 234), when counsel for appellant stated "It may have been not proper," "The Court: Very improper, I should say" (p. 234). I do not find the word "indecent" used by the Vice Chancellor.

If it was induced by an overpowering "human impulse" what was the objection to telling the Court what had been said between counsel for appellant and appellant when he called counsel up before he yielded to the *human* impulse?

I ask the Court to read the testimony of appellant on cross-examination, page 45, etc. From page 45 to 51 he relates what he says occurred when he saw her in Saranac after the commencement of this suit in July of 1929; he admits that, as a lawyer, he knew that he could not succeed in his suit if she had told him about the tuberculosis condition before marriage and that he talked to her about that and, although he insists that it was

she who brought it up, he talked to her about the merits of the case and told her that she had deceived him, although his sole purpose in going to see her was to *console* her; notwithstanding the fact that he admits that, in December, 1928, at a time when he found his wife sobbing as though her heart would break (p. 52), she told him that she should never have dragged him into it and that she *should have told him* "that she had been sick before she married me", and that she had dragged "me into this thing innocently", he *had* to deny that she used the word "tuberculosis" and that he was suspicious for, after that, he lived with her as husband and wife, at least the contrary is not shown.

But he *knew* all about the sickness in February, 1928, and she knew that he knew all about it so how in the world could appellant have thought it was *that* sickness to which she referred when she said, "I should have told you"? He testified (p. 53):

"Q. You had nothing to suspect? A. No, sir.

Q. Now, wait. You had nothing to suspect when this woman was in bed crying as though her heart would break and when she said to you, 'I shouldn't have dragged you into this thing, I should have told you'— A. Exactly, I did not—(interrupted).

Q. Wait—you mean to say that to your lawyer mind there was nothing suspicious in that? A. Nothing suspicious, Mr. Lane, because I referred her back to that illness in February and she seemed to say that. That is the way the conversation ended.

Q. Well, she seemed to say that that was the thing about which she should have told you, when you knew and she knew that you knew? A. The only way I can answer your question, Mr. Lane, is that I do not know what she had in mind. I did not press the question.

Q. Why didn't you? A. It did not occur to me.

Q. Why not? A. Because the circumstances of the case called more for *consoling* her. She was very ill at the time. I didn't want to discuss any prior illnesses or anything else that she may have referred to at the time. I simply wanted to console her.

Q. Did you know she was referring to a prior illness? A. I don't know whether she was. She most likely was.

Q. Did you think so at the time? A. She most likely was, but it did not occur to me to question her about it, and I did not question her about it. I did not ask her a word about it."

And page 54:

"Q. Why didn't you ask her the next time, or some other time when she was not sobbing so that her hear would break, as to what she meant when she used the words, 'I should not have dragged you into this, I should have told you?' A. Mr. Lane, that girl was so sick at that time, she was coughing so violently, she had such difficulty in bringing up sputum, she had such fever all the time that it was no occasion or time to discuss with her anything of the nature that you want me to tell you about now, and it never occurred to me to ask her about those things at that time."

In reference to his visit in July, 1929, at Saranac he testified (p. 55):

"Q. So when she was up there this last time she was apparently all right? A. She seemed to be. *She seemed to be as well as she looks now in the court room.*

Q. And that is the reason why you talked to her in the way you did? A. I don't quite understand your question, Mr. Lane.

Mr. Lane: Withdraw it.

Q. I thought you said that you went up there to console her? A. I did not go up to console her, Mr. Lane.

Q. Then why in the world did you go there?
A. I told you I went up there, Mr. Lane, only for one purpose.

Q. Yes, I know that. A. I had been up there two and a half days and I was seized with an *impulse* or *desire* to see her and I wanted to see her for a few minutes.

Q. What was this desire or impulse due to, love or affection or what? A. I don't know what it may have been due to.

Q. *Did you love your wife at that time?*
A. *No, sir; I cannot say I did.*

Q. All right. Then what was this impulse?
A. It was just an impulse perhaps from my long relationship with her. I don't know how I can explain it, except the idea entered my mind and I thought I would go at that time and see her for a few minutes and I did see her for a few minutes.

Q. So you cannot tell me what the impulse was due to? A. No.

Q. It was not due to love, it was not due to affection. Might it have not been due to the only concrete thing that has been suggested so far and that has been suggested by me, for you to get an admission out of her or an agreement by her that she would let this suit go through? A. No, sir; Mr. Lane.

Q. Well, can you think of any other concrete thing? A. Mr. Lane, the only way I can answer your question is that if you or anyone else can explain the human emotions that cause us to do or not to do things, then perhaps I can define my answer in that way."

Aside from everything else in this case there was sufficient for the Court to find, on appellant's own testimony, that in December, 1928, at the time he talked with his wife, enough was said to put him upon inquiry and yet he continued to live with her.

An examination of appellant's testimony (pp. 21, 22, 23, 24, 25, 66, 67, 68, 72 and 75 and 76) will indicate, I submit, that appellant *must* have

known, or had facts sufficient to put him upon inquiry, had he not been informed prior to the marriage, that she had suffered from tuberculosis, that there was danger of tuberculosis.

He insists that he did not know that Dr. Ornstein was a specialist and yet he says that, when he suggested that respondent be attended by his physician Dr. Fuerstman, she objected because he was *not a specialist*. He relates a conversation (p. 76) which he had with Dr. Fuerstman, prior to December, 1928, and says that Dr. Fuerstman told him that, without an examination, he could tell that she was suffering from tuberculosis. He says that about Thanksgiving, 1928, when they were talking together with members of the family present, the following occurred:

“Q. You said what? A. I said, ‘That is what they learn at college, *probably got that at Brown.*’ And her mother said, ‘Yes, that is where this whole business *started, at Brown.*’”

(“That” referring to the illness). What “whole business”?

This statement is clear corroboration from appellant that respondent told him before the marriage, as she says she did, that she had had an attack of tuberculosis and that it had started at *Brown*. How otherwise explain “whole business”?

What otherwise put “*Brown*” so patly in the mind of appellant?

It is true that, during this illness, both Dr. Ornstein and Dr. Greifinger stated that the illness from which she was *then* suffering was not the result of the old tuberculosis and, if appellant had not known about the old tuberculosis, the reassuring conversations which he says he had with Dr. Ornstein and Dr. Greifinger would not have taken place nor would he have contented

himself, for the length of time he did, without making further inquiry than he did.

The fact is that Dr. Ornstein and Dr. Greifinger were correct when they said that the illness from which she was suffering was *not* due to the old tuberculous condition. There is a divergence of medical view upon this point, Dr. Brown and Dr. Leetch for appellant having one opinion and Dr. Ornstein and Dr. Greifinger for respondent having another. But the fact is that she recovered completely as indicated by the testimony of appellant himself when he says that, when he saw her in July, 1929, she looked just as well as she did in court (p. 42). She was, in court, a fine-looking, well-appearing, healthy woman and all the treatment she had had was rest.

In any event, the testimony of Dr. Ornstein indicates that he was absolutely sincere in his opinion and in his advice and reassuring statements and Dr. Leetch, for appellant, testified that a relapse of tuberculosis *could* be caused by conduct on the part of a husband "which rendered the patient highly nervous and excitable by making charges that the husband would get a divorce, berating the defendant for her condition, complaining that she was a drain on his resources, complaining that her condition interfered with his social activities by reason of the fact that he couldn't stay out late at night, and the worry induced and the excitement induced by those causes of complaint" which would cause worry and excitement (pp. 273, 274). And respondent testified in this cause to just such conduct on the part of the husband, including also demands for money (pp. 202, 203, 204, 205).

In annulment cases as well as in divorce, corroboration is required. *Bolmer v. Edsall*, 90 N. J. Eq. 299, at 304.

There is not a scintilla of corroboration of appellant's testimony, as is admitted by appellant, of his statement that he did not know prior to the marriage this condition of tuberculosis. His counsel said at the close of the case, p. 229:

“Now, Mr. Lane says that the case of my client stands alone on his testimony. Of course it does. *It stands alone on his testimony.* Our case is all predicated upon the lack of representation, upon the lack of information, and there can necessarily be no corroboration of something which a person did not say. There cannot be any corroboration of such a thing.”

The case of appellant, under *Buechler v. Simon*, 7 N. J. A. R. 967, depended upon *conscious* suppression of the truth by respondent with a knowledge on her part that, if she told the truth, appellant would not marry her. It may be difficult to corroborate in a case of this kind but the difficulty does not dispense with the necessity for corroboration.

The Court of Chancery was asked to grant an annulment of the *consummated* marriage, where the parties had lived together as man and wife for several months, upon the *unsupported* testimony of the husband, opposed by the testimony of the wife, plus the testimony of her brother, plus the testimony of Dr. Ornstein, a distinguished physician, in no wise interested, in the legal sense, and this court is asked to reverse the finding of fact of the Vice-Chancellor.

Counsel for appellant admits (p. 21): “It is almost elementary that an appellant court seldom disturbs the findings of the court below on disputed questions of fact * * *”, as he must admit, for the last expression of this court upon that subject was as recently as the present term, in *Sparks v. Lorentowicz*, decided May 19, 1930, 106 N. J. E. 178, in which this court said:

“The evidence is contradictory on a number of salient points. On these contradictions the learned Vice-Chancellor resolved the facts in accordance with the tenant’s version, and there is such substantial support in the evidence for the conclusion that we are not disposed to make conflict with the conclusions of the trial court in this respect. *Cartan v. Phelps*, 91 N. J. E. 312.”

There certainly is substantial support in the testimony *in this case* for the finding that appellant knew, prior to the marriage, that his wife had suffered from tuberculosis.

I have already in this brief referred to the attempt of appellant to bring before this court that which is not in the record and not present at the trial, *i. e.* “the faltering tongue”, and the “ring and earmark of insincerity and untruth” of Dr. Ornstein and the “sheepishness” and the “mumbling” and the “monotone” of Dr. Greifinger and the “ring of sincerity” of appellant.

I now refer to pages 22 and 23 of appellant’s brief in which he attempts to inject into the record the *demeanor and conduct* of the witnesses as they testified and the *expression of their faces*, etc. The argument defeats itself for appellant concedes that all of these things “and the shifting of the body, the motions of the hand, and numerous other human motions and actions that betray the liar and indicate false testimony”, are of importance in determining the truth. All those matters were before the court below and that court had no hesitancy in concluding, taking *all* into consideration, that appellant was the perjurer and not respondent and her two witnesses.

Appellant concedes, page 23, that the learned vice-chancellor was “guided by the spoken word”. He was *bound* by the spoken word unless there was something in the conduct of the witnesses, and

the like of that, which indicated that the spoken word of three people was false and the statement of one person true. How can appellant ask this Court to reverse where the spoken word was given due consideration and where those elements which alone could affect the force of the spoken word are not before this Court?

I repeat that there was no such exhibition of shifting of heads, motions of bodies, etc., as appellant suggests.

This is, I submit, a clear case of a young man who was quite willing to marry the girl in February of 1928, even if she "*had a wooden leg*," because her family had money and he thought that he could get some of it. He, perhaps, did not realize that, because of her previous condition of tuberculosis, a cold or a slight illness might so affect her as to make her rather a drag upon him and interfere with his social activities. He was told that, because of the previous condition, she *had* to be careful but he was blinded either by love or by a desire to obtain money. But it hardly fits in with the idea that he was blinded by love that, when his wife became ill and needed his care and affection, he ceased to love her for, although in July of 1929 he was imbued with a *human* impulse, notwithstanding the pendency of this suit, to see his wife and to console her, he frankly says that he did not love her (p. 56). If one once loves, one does not lose that love because the object becomes ill. Quite the contrary.

The very fact that love *ceased* when illness came indicates that the inception of this marriage was not love. Then what was it? It certainly was no desire for children for appellant insists that he had sexual intercourse in such a manner as to prevent conception because *he did not want to bother about children* (p. 71). I think what it was is disclosed in the cross-examination of appellant

(pp. 80, 81, 82, 83) at which latter point it appears that, when he went up to visit his wife in Saranac in February, 1929, *he succeeded in having her pay his expenses* (he says that this was to keep track of it (p. 84)) and see the cross-examination of respondent (pp. 203, 204, 205) and the examination of appellant in rebuttal (p. 222).

He made up his mind to get his annulment in the language of his wife because "I was a financial burden, that he would become neurotic because I could not assume the responsibilities of a wife, that he would have to forego social life because I had to go to bed early; on those grounds he would appeal to the sympathy of the court" (p. 194).

I respectfully submit that this decree should be affirmed.

Respectfully submitted,

MERRITT LANE,
Of Counsel for Respondent.

